

# No Small Change of Soldiering: The Commander's Emergency Response Program (CERP) in Iraq and Afghanistan

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With the battles of last March and April, the collapse of Iraq's military, and the fall of Baghdad now history, U.S. armed forces in Iraq today are engaged in what John Keegan has referred to as "the small change of soldiering."<sup>2</sup> Keegan's metaphor is apt. In the view of some soldiers, unorthodox missions<sup>3</sup>—such as peacekeeping, noncombatant evacuation, humanitarian assistance, or, as now, military occupation<sup>4</sup>—fulfill a warrior's calling<sup>5</sup> about as well as odd nickels build a fortune. Yet ironically, in the lives of ancient and modern soldiers

alike, such missions have tended to outnumber more conventional battles,<sup>6</sup> just as coins and smaller denominations of currency tend to predominate in daily retail business.

Even unorthodox missions can instantly become deadly ones. As Keegan himself observes, the experience of soldiering outside traditional battlegrounds is often dangerous and violent. Americans have learned for themselves in Iraq, and in post-Taliban Afghanistan, that the overall toll of stability operations<sup>7</sup>

1. I thank the following people for their assistance in preparing this article: Ms. Catherine Ailes, Colonel Dan Bolger, Ms. Ann Cataldo, Captain Hal Dronberger, Colonel Lyle Cayce, Colonel Rich Hatch, Lieutenant Colonel Walt Hudson, Colonel J.D. Johnson, Lieutenant Colonel Randy Lee, Lieutenant Colonel Chuck Pede, Major General David Petraeus, Mr. Roger Pitkin, Colonel Fred Pribble, Lieutenant General Ricardo Sanchez, Captain Rich Snead, Ms. Mary Tompkey, and Colonel Marc Warren. By mentioning their names, I do not impute to my colleagues agreement with what follows, and of course I alone am responsible for any errors. Also, the opinions expressed herein are mine in a personal rather than an official capacity, and should not be regarded as policy or positions of the Department of Defense or the Chairman of the Joint Chiefs of Staff.

2. JOHN KEEGAN, *THE FACE OF BATTLE* 14 (1976) ("For there is a fundamental difference between the sort of sporadic, small-scale fighting which is the small change of soldiering and the sort we characterize as a battle.").

3. Unorthodox missions are those that diverge in one or more respects from conventional notions of war fighting. See Roger Spiller, *The Small Change of Soldiering and American Military Experience*, in U.S. Army, *The U.S. Army Professional Writing Collection*, available at [http://www-http://www.army.mil/prof\\_writing/volumes/volume1/october\\_2003/10\\_03\\_3.html](http://www-http://www.army.mil/prof_writing/volumes/volume1/october_2003/10_03_3.html) (last visited Feb. 10, 2004). This was an introductory paper presented to a conference, "Armed Diplomacy: Two Centuries of American Campaigning," hosted by the U.S. Army Command and General Staff College's Combat Studies Institute at Fort Leavenworth in August 2003. *Id.* A related but distinguishable expression in official joint doctrine is "military operations other than war," which are defined as "[o]perations that encompass the use of military capabilities across the range of military operations short of war. These military actions can be applied to complement any combination of the other instruments of national power and occur before, during, and after war." U.S. DEP'T OF DEFENSE, JOINT PUB. 1-02, *DICTIONARY OF MILITARY AND ASSOCIATED TERMS* 334 (5 Sept. 2003) [hereinafter JOINT PUB. 1-02]. I choose to use the looser, non-doctrinal "unorthodox" to describe these diverse missions because while ongoing operations in Iraq challenge traditional conceptions of warfighting, I believe they are not "other than" or "short of" war. They are a modern species of war itself.

4. Operation Iraqi Freedom marks the first time since the post-WW II occupations of Germany and Japan that the United States has officially assumed the status and responsibilities of an occupying power under international law. See, e.g., Address to the Iraqi People by L. Paul Bremer, Coalition Provisional Authority Administrator, Nov. 21, 2003, available at [http://www.cpa-iraq.org/transcripts/20031121\\_Nov-21-Bremer-Address.htm](http://www.cpa-iraq.org/transcripts/20031121_Nov-21-Bremer-Address.htm) ("Under the agreement [between the Coalition and the Governing Council on a process to bring sovereignty to the Iraqi people] the occupation will end at the end of June 2004.") (emphasis added). The international community similarly regards the United States as an occupying power. See S.C. Res. 1483, U.N. SCOR, 4761st mtg, U.N. Doc S/RES/1483 (May 22, 2003) [hereinafter S.C. Res. 1483] (recognizing "the specific authorities, responsibilities, and obligations under applicable international law of [the United States and the United Kingdom] as occupying powers under unified command . . ."). Military occupation is "an incident of war" that "does not transfer sovereignty to the occupant, but simply the authority or power to exercise some of the rights of sovereignty." U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, *LAW OF LAND WARFARE* para. 358 (18 July 1956 (C1, 15 July 1976)) [hereinafter FM 27-10]. The temporary exercise of these sovereignty rights "results from the established power of the occupant and from the necessity of maintaining law and order, indispensable both to the inhabitants and to the occupying force." *Id.* The law and practice of belligerent occupation is a specialized field within the law of war, key rules of which are codified in the Regulations Annexed to Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277 [hereinafter Hague Regulations] and in the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC]. See generally GERHARD VON GLAHN, *THE OCCUPATION OF ENEMY TERRITORY—A COMMENTARY ON THE LAW AND PRACTICE OF BELLIGERENT OCCUPATION* 3-39 (1957).

5. See, e.g., Spiller, *supra* note 3, at 3 ("As one soldier said of his role in stability operations in Panama, 'I didn't sign up for this bullshit.'") (citing conference notes).

6. A prominent study of U.S. military operations short of conventional war counted 215 overseas interventions between the years 1946 and 1975; many of these included deployment of ground troops. See BARRY M. BLECHMAN & STEPHEN S. KAPLAN, *FORCE WITHOUT WAR: U.S. ARMED FORCES AS A POLITICAL INSTRUMENT* 16 (1978). A more recent Congressional Research Service study counted an additional fifty-four overseas interventions short of war between 1981 and 1996. See CONGRESSIONAL RESEARCH SERVICE, *REPORT FOR CONGRESS 96-119F: INSTANCES OF USE OF U.S. ARMED FORCES ABROAD, 1798-1995* (1996). Sixteen of these occurred during the Reagan presidency, thirteen occurred during the elder Bush's presidency, and twenty-five occurred during the first term of the Clinton presidency. *Id.* Though prepared for a full-scale war in Iraq, coalition commanders anticipated the likelihood soldiers would encounter something else as well. See William H. McMichael, *Army General: U.S. Ready for War*, GANNETT NEWS SERVICE ONLINE NETWORK, Mar. 10, 2003 (quoting Lieutenant General David D. McKiernan: "In a post-hostility environment—what we call stability and support operations—we train and have a lot of experience, actually, between the Balkans and Afghanistan and other operations . . . and we would certainly plan for all of those contingencies.").

can far exceed that of conventional battle.<sup>8</sup> This holds true whether the toll is measured in blood, life, or national treasure.

For the battle is distinguished from other soldiering by the convergence of time, place, and action, not by whether an enemy is present.<sup>9</sup> The campaign to defeat the former Iraqi regime occurred in a period of less than three weeks (time) in the Euphrates River Valley, near Baghdad (place), and involved the overwhelming of enemy regiments by massive ground and air fires synchronized with rapid armored maneuver (action).<sup>10</sup> Eighteen months earlier, the initial battles for Afghanistan similarly took only about three weeks, in and near a few key northern cities, where Taliban formations were routed with precision air strikes directed by Special Forces accompanying Northern Alliance ground troops.<sup>11</sup> The aftermaths of these battles have spread across many months, into every geographical region of these two large countries, and have involved sporadic and disparate action of varied intensity.

Hostile elements remain in both Iraq and Afghanistan, and though they are smaller, they are also more difficult to identify and more complicated to defang. According to a modern military cliché, the time span of this phase will be as long it takes to win the “hearts and minds”<sup>12</sup> of the Iraqi and Afghan peoples. Potential battlefields will extend to wherever recalcitrant Fedayeen, or the Taliban, or Al Qaeda may be hiding even after most hearts and minds are won. The critical action to succeed in this phase will be the growth of Iraqi and Afghan institutions of security and self-government.

This article describes a program by which field commanders in Iraq and Afghanistan can fund initiatives to win hearts and minds, hunt enemies, and promote the growth of local institutions in this unorthodox phase of war. The Commander’s Emergency Response Program (CERP) is novel and important, providing U.S. governmental appropriations directly to tactical units for the purpose of meeting emergency needs of local Iraqi and Afghan civilians. The CERP’s novelty and importance

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7. “Stability operations” is another expression used to refer to unorthodox missions. See, e.g., Lawrence A. Yates, *Military Stability and Support Operations: Analogies, Patterns, and Recurring Themes*, MIL. REV. 51 (Oct. 1997) (exploring generally the distinctions between “nontraditional” or “unorthodox” military operations and “traditional warfare”). Still another expression is “small wars.” See U.S. MARINE CORPS, *SMALL WARS MANUAL* (1940). The Army has officially adopted “stability and support operations” as the counterpoise to traditional “offensive” and “defensive” operations. See U.S. DEP’T OF ARMY, *FIELD MANUAL 3-07, STABILITY OPERATIONS AND SUPPORT OPERATIONS* (20 Feb. 2003) [hereinafter FM 3-07]. Earlier, the Army had experimented with “low-intensity conflict,” see U.S. DEP’T OF ARMY, *FIELD MANUAL 100-20: MILITARY OPERATIONS IN LOW INTENSITY CONFLICT* (5 Dec. 1990) and, “operations other than war,” see U.S. DEP’T OF ARMY, *FIELD MANUAL 100-5: OPERATIONS 2-0* (14 June 1993), a close relative of the current joint doctrinal term. For an account of modern evolutions of related terminology, see generally Colonel David Fastabend, *The Categorization of Conflict*, PARAMETERS 75-87 (1997).

8. The Department of Defense publishes the identity of casualties at <http://www.defenselink.mil/releases/>. U.S. Dep’t of Defense, *News Releases*, available at <http://www.defenselink.mil/releases/> (last visited Feb. 6, 2004). The news media and nongovernmental organizations often give casualty numbers in two separate figures—before and after the President’s announcement of an end to major combat operations on 1 May 2003. See, e.g., Helen Thomas, *Who’s Counting the Dead in Iraq?* MIAMI HERALD, Sept. 5, 2003, at 1; GlobalSecurity.Org, *Casualties in Iraq*, Dec. 30, 2003, available at [http://www.globalsecurity.org/military/ops/iraq\\_casualties.htm](http://www.globalsecurity.org/military/ops/iraq_casualties.htm) (recording 138 U.S. personnel killed and 550 wounded before 1 May and 338 killed and 2152 wounded between 1 May-28 December 2003).

9. See KEEGAN, *supra* note 2, at 14.

10. See, e.g., CNN, *Euphrates Battle May Be Biggest So Far*, Mar. 25, 2003, available at <http://www.cnn.com/2003/world/meast/03/25/sprj.irq.war.main/>; David Espo, *Fierce Fighting on Road to Baghdad*, AP, Mar. 28, 2003, available at <http://www.macon.com/mild/macon/5498063.htm>; CBS News, *Baghdad’s Fall Stuns Arab World*, Apr. 9, 2003, available at <http://cbsnews.cbs.com/stories/2003/04/09/iraq/main548587.shtml>; Dan Rather, *On The Scene: Baghdad After the Fall*, CBS NEWS, Apr. 11, 2003, available at <http://www.cbsnews.com/stories/2003/04/11/iraq/scene/main548945.shtml>.

11. See, e.g., Jim Lehrer, *The Fall of Kabul*, PUBLIC BROADCASTING SERVICE ONLINE NEWS HOUR, Nov. 13, 2001, available at [http://www.pbs.org/newshour/bb/asia/afghanistan/kabul\\_11-13.html](http://www.pbs.org/newshour/bb/asia/afghanistan/kabul_11-13.html); David Rennie & Michael Smith, *Northern Alliance Poised to Capture Key City*, ELECTRONIC TELEGRAPH, Nov. 8, 2001, available at <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2001/11/08/wafg08.xml>; CNN, *Taliban Agree to Stop Fighting in Konduz*, Nov. 21, 2001, available at <http://www.cnn.com/2001/US/11/21/gen.war.against.terror/>; see also Interview with Lieutenant Colonel Don Bolduc, Former Operations Officer of 2d Battalion, 5th Special Forces Group, in Washington, D.C. (Jan. 20, 2004) (affirming that the fall of Kabul, the political center of gravity, was decisive but also noting that simultaneous actions in and around Kandahar, the religious center of gravity, were critical to success).

12. See, e.g., ROGER TRINQUIER, *MODERN WARFARE: A FRENCH VIEW OF COUNTERINSURGENCY* 8 (D. Lee trans., 1st Eng. ed., 1964) (“We know that the *sine qua non* of victory in modern warfare is the unconditional support of a population.”). See also Gavin Bulloch, *Military Doctrine and Counterinsurgency: A British Perspective*, PARAMETERS 4 n.2 (1996).

When asked if he had sufficient troops [General Sir Gerald Templer, High Commissioner and Director of Operations Malaya in 1952 at the height of the insurgency against the British authorities] responded by saying emphatically that he had, adding that “The answer lies not in pouring more soldiers into the jungle but rests in the hearts and minds of the Malayan people.”

*Id.* See FM 3-07, *supra* note 7, at 3-4. The manual states:

Success in counterinsurgency goes to the party that achieves the greater popular support. The winner will be the party that better forms the issues, mobilizes groups and forces around them, and develops programs that solve problems of relative deprivation. This requires political, social, and economic development. Security operations by military and police forces, combined with effective and legitimate administration of justice, provide the necessary secure environment in which development can occur.

*Id.*

present challenges for implementation of the program, as the undisciplined or uncoordinated use of CERP funds could result in Congress abruptly ending them. Such a fate is worth averting, because the program's early success demonstrates that relatively small amounts of money spent locally and intelligently by commanders can yield great benefits.

### Origins of the CERP

The CERP originated as an effort to provide commanders in Iraq with a stabilization tool for the benefit of the Iraqi people. Initial resources for that effort came from hoards of ill-gotten Ba'athist Party cash. Days after the toppling of Saddam Hussein's statue in Baghdad, U.S. soldiers discovered huge secret caches of U.S. currency. In the exclusive Baghdad residential cottages of regime officials, soldiers of the 3d Infantry Division found more than a hundred aluminum boxes containing about \$650 million, most of it in sealed stacks of \$100 bills.<sup>13</sup> Days later, soldiers found another \$112 million hidden in a nearby animal kennel.<sup>14</sup> This cash, along with the other regime assets recovered in the weeks and months that followed, provided a source of funding for—among other things crucial to a secure and democratic Iraq—projects responding to emergency needs of the Iraqi people.

In contrast to the shady handling of these funds by senior Ba'athists, the American handling of the recovered assets was transparent, well-documented, and subject to law. United States Treasury Department officials provided expertise to determine the authenticity of all seized negotiable instruments.<sup>15</sup> A Presidential memo required the Department of

Defense (DOD) to prescribe procedures governing use, accounting, and auditing of seized funds in consultation with the Departments of Treasury, State, and the Office of Management and Budget (OMB).<sup>16</sup> The Defense Department, in coordination with OMB, further determined that seized funds were not to be regarded as "miscellaneous receipts" of the United States because such funds were not received "for the Government" within the meaning of federal appropriations law.<sup>17</sup>

Meanwhile, field commanders and senior policymakers ensured that seizure, control, and disposition of former regime property complied with international law relating to armed conflict and occupation.<sup>18</sup> Specifically, U.S. Central Command (USCENTCOM) announced that in seizing the funds, coalition forces were taking possession of and safeguarding movable property of the State of Iraq, rather than personal property of its citizens.<sup>19</sup> Evidence that many of the assets had been obtained from illicit skimming of profits from oil sales in violation of United Nations sanctions caused coalition leaders to reject the notion that individual senior Ba'athists were rightful owners.<sup>20</sup>

A multitude of emergency needs developed in the vacuum of functioning Iraqi civil institutions. Clearing streets of destroyed vehicles, bulldozing mountains of garbage, distributing rations, repairing damaged roofs, wells, and sewers, rehabilitating broken-down jails and police stations, and tending to a variety of urgent medical needs became the business of soldiers.<sup>21</sup> These relief and reconstruction activities were undertaken to the extent that continuing combat operations against hostile elements permitted or, in some cases of particularly grievous collateral damage, demanded.<sup>22</sup>

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13. David Zucchini, *Troops Find Baghdad Stash: \$650 Million—Little-noticed Cottages Hold Boxes of Cash*, SAN. F. CHRON, Apr. 19, 2003, at A-10; Interview with Colonel David Perkins, Former Commander of 2d Brigade, 3d Infantry Division, in Washington, D.C. (Oct. 22, 2003) [hereinafter Interview with COL David Perkins].

14. David Zucchini, *\$768 Million Found So Far in Baghdad*, L.A. TIMES, Apr. 23, 2003, at 7. Some portion of the discovered currency was in Euros. See U.S. CENTRAL COMMAND, NEWS RELEASE NUMBER 03-04-210, *\$100M, 90 M Euros Recovered*, Apr. 29, 2003.

15. *Efforts to Track Down and Recover Saddam Hussein's Assets: Hearings Before Subcomm. on Oversight and Investigations of the House Comm. on Financial Services*, 108th Cong., 1st Sess. (May 14, 2003) (written statement of David D. Aufhauser, General Counsel, Department of Treasury), available at <http://www.treas.gov/press/releases/js373.htm>.

16. Memorandum, The President to the Secretary of Defense, subject: Certain State- or Regime-Owned Property in Iraq (30 Apr. 2003) [hereinafter Presidential Memo on Regime Property].

17. E-mail from E. Scott Castle, General Counsel, Coalition Provisional Authority, and Deputy General Counsel (Fiscal), Department of Defense, to Author (30 Oct. 2003) (on file with author). Mr. Castle recalled interagency coordination, construed 31 U.S.C. § 3302(b), and concluded that

[i]n requiring DoD to [prescribe procedures governing use, accounting and auditing of seized funds in consultation with Treasury, State, and OMB, the Presidential Memo on Regime Property] implicitly recognized that seized funds are regarded as "off-Treasury" for scoring and related purposes, and are not subject to extant fund control procedures applicable to Treasury assets.

*Id.* See also 31 U.S.C. § 3302(b) (2000).

18. E-mail from Colonel Lyle Cayce, Staff Judge Advocate, 3d Infantry Division to Colonel Marc Warren, Staff Judge Advocate, V Corps, to Colonel Dick Gordon, Staff Judge Advocate, Combined Forces Land Component Command, to Colonel Karl Goetzke, and to Author (22 Apr. 2003) (on file with author).

The earliest humanitarian and civic assistance efforts in Iraqi neighborhoods were resourced with military manpower, services, and supplies but included virtually no disbursements of wages to local civilians capable of contributing.<sup>23</sup> Judge advocates correctly advised that DOD funds could lawfully be spent

on certain emergency relief and reconstruction projects because coalition ground forces had assumed responsibility as an occupying army.<sup>24</sup> Yet uncertainty concerning the nature and scope of projects that could be funded under this authority, combined with the conservative mechanisms and habits of financial man-

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19. See, e.g., Nicole Winfield, *U.S. Forces Hold \$600 Million Found in Baghdad*, AP, Apr. 22, 2003, available at <http://www.fortwayne.com/mld/newssentinel/5689094.htm> (reporting release by U.S. Central Command that "if it's real, it belongs to the Iraqi people"). The official U.S. military pronouncements regarding seized former regime movable assets were thus consistent with the pertinent rule from the law of occupation:

An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and generally, all movable property belonging to the State which may be used for operations of the war.

Hague Regulations, *supra* note 4, art. 53. Evidence that a large sum of currency had been hastily withdrawn from the Central Bank of Jordan by Ba'athists on the eve of the ground invasion strongly indicated that the funds were not private property, see, e.g., Zucchini, *supra* note 14 (describing seal on one box dated 16 March 2003 and signed by five Ba'ath Party ministers), which the occupying force cannot confiscate under the law of war. See Hague Regulations, *supra* note 4, art. 46. With regard to real property, Coalition forces issued orders that only certain public buildings and lands were to be used in support of military operations, see, e.g., Headquarters, U.S. Army V Corps, Fragmentary Order 165M to Operation Order Final Victory (111536L May 03), thereby also implementing occupation law pertaining to real property. See Hague Regulations, *supra* note 4, art. 55 ("The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country."), art. 56 ("The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property.").

20. See, e.g., CBS News, *Saddam May Still Have Billions*, Dec. 4, 2003, available at <http://www.cbsnews.com/stories/2003/12/04/iraq/main586715.shtml> (reporting former Iraqi planning minister Jewad Hashem's assertions that five percent of oil revenues was ordered deposited abroad in accounts under Saddam's supervision when Iraq nationalized its oil industry in 1972 and recording Hashem's calculations that from 1972 to 1990, the deposits would have amounted to \$31 billion). In May of 2003, the United Nations Security Council called on member states to freeze all funds, financial assets, or economic resources that had been removed from Iraq by Saddam Hussein or other senior former Iraqi officials and their immediate family members and to transfer said funds, assets, and resources to the Development Fund for Iraq. See S.C. Res. 1483, U.N. SCOR, 4761st mtg. U.N. Doc S/RES/1483 para. 23 (2003). At the onset of hostilities, the President of the United States had exercised emergency powers and authority under 50 U.S.C. §§ 1601-51, 1701- 07, and 3 U.S.C. § 301 to order confiscation of certain Iraqi property and vesting of that property in the U.S. Department of Treasury with the intent "that such vested property should be used to assist the Iraqi people and to assist in the reconstruction of Iraq . . ." Exec. Order No. 13,290, 68 Fed. Reg. 14,307 (Mar. 20, 2003). Note that the funds held in the United States and ordered to be "vested" by Executive Order 13,290, an amount totaling approximately \$1.7 billion as of 16 May 2003, must be distinguished from assets that were "seized" in Iraq under the laws and usages of war. *Id.*

The different legal authorities, forms, and locations for assets compel slightly different procedures with regard to receipt, transport, safeguarding, accountability, and use. See generally Action Memorandum, Undersecretary of Defense (Comptroller) to Secretary of Defense, subject: Delegation of Authority to Seize Certain State- or Regime-Owned Property in Iraq and Procedures Applicable to Vested and Seized Iraqi Property (16 May 2003) (enclosing for approval and signature the memorandum cited in note 32, *infra*, as well as seven pages of "Procedures for Administering, Using, and Accounting for Vested and Seized Iraqi Property"). It is important to emphasize that the overriding imperative of all U.S. and international pronouncements with regard to former Iraq regime property was that handling be lawful and transparent and that use be for the benefit of the Iraqi people. The administration successfully defended this policy imperative in federal court. Seventeen former prisoners of war from the 1991 Gulf War and thirty-seven of their close family members sought to attach vested Iraqi funds in the United States under section 201 of the Terrorism Risk Assurance Act (28 U.S.C. § 1610) in satisfaction of a judgment against the Republic of Iraq, Saddam Hussein, and the Iraqi Intelligence Service. See 28 U.S.C. § 1610 (2000); *Acree v. Snow*, 276 F. Supp. 2d 31 (D.D.C. 2003) (denying injunction because on 7 May the President had made section 201 inapplicable with respect to Iraq), *injunction pending appeal denied* 78 Fed. Appx. 133, 2003 U.S. App. LEXIS 15654 (D.C. Cir. Aug. 4, 2003).

21. Interview with Colonel Lyle Cayce, Staff Judge Advocate, 3d Infantry Division, in Baghdad, Iraq (May 15, 2003) [hereinafter Interview with COL Lyle Cayce]; Interview with Captain Jacque Tubbs, Brigade Judge Advocate, 130th Engineer Brigade, in Balad, Iraq (May 2, 2003).

22. Interview with Lieutenant Colonel Paul Grosskruger, Commander of 94th Engineer Battalion (June 5, 2003) [hereinafter Interview with LTC Paul Grosskruger]. The demands did not arise from a legal obligation to compensate victims of combat collateral damage, but rather from U.S. responsibilities as an occupying power. See discussion *infra* at note 24 and accompanying text.

23. See Interview with COL Lyle Cayce, *supra* note 21; Interview with LTC Paul Grosskruger, *supra* note 22.

24. See E-mail from Colonel Lyle Cayce to Author (17 Jan. 2004) [hereinafter COL Lyle Cayce E-mail] (recalling 23 March 2003, during 3d Infantry Division's drive to Baghdad, as the first time 3d Infantry Division commanders were advised that O&M could be used); E-mail from Kelly Wheaton, Deputy Legal Counsel to the Chairman of the Joint Chiefs of Staff to Numerous Addressees (15 May 2003) ("DOD appropriations are legally available to carry out activities reasonably necessary to fulfill those responsibilities imposed on an occupying power under international law."). Certain provisions in the Fourth Geneva Convention provide compelling support for this proposition: "To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food and medical supplies of the population; it should, in particular, bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate." GC, *supra* note 4, art. 55. Still, authority to use DOD funds attenuates as Congress undertakes to discharge the U.S. treaty obligation with legislation and funding apportioned to various executive branch agencies, thereby relieving the DOD of the necessity of doing so. See Emergency Wartime Supplemental Appropriations Act, 2003, Pub. L. No. 108-11, 117 Stat. 559, 564, 573-74 [hereinafter 2003 EWSAA] (authorizing as of 16 April, when the Act was signed into law, the transfer of funds into the Overseas, Humanitarian, Disaster and Civic Aid appropriation and appropriating \$2.475 billion for an Iraq Relief and Reconstruction Fund). *But see* 10 U.S.C. § 2242 ("The Secretary of Defense and the Secretary of each military department may . . . pay expenses incurred in connection with the administration of occupied areas.").

agement, inhibited direct expenditure of O&M funds to locally purchase goods or services for humanitarian requirements.<sup>25</sup>

The availability of seized regime cash and the urgent need for humanitarian response compelled the Coalition Commander to establish a “Brigade Commander’s Discretionary Recovery Program To Directly Benefit the Iraqi People.” This was done in a fragmentary order (FRAGO) on 7 May 2003.<sup>26</sup> Unit and DOD comptrollers and finance officers, in coordination with officials from the newly arrived Office of Reconstruction and Humanitarian Assistance (ORHA),<sup>27</sup> quickly

developed procedures to properly account for, secure, control, and pay out seized Iraqi cash, and to keep it separate from appropriated funds in an austere and fluid field environment.<sup>28</sup> Not surprisingly, tactical unit finance and micro-purchase procedures provided the model for these aspects of the new program.<sup>29</sup>

In June 2003, the Administrator of the Coalition Provisional Authority (CPA)<sup>30</sup> gave the program its current name, formally linked it to governing law and authorities relating to Iraqi property,<sup>31</sup> and articulated its central purpose. Ambassador Bremer,

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25. See text accompanying notes 85-118 (explaining significance of CERP).

26. Headquarters, U.S. Army V Corps, Fragmentary Order 104M to Operation Order Final Victory (070220L May 03).

CJTF-7 executes a program to invest monies immediately and directly in support of the Iraqi people by providing cash, guidance, and spending authority directly to Brigade and O-6 level commanders. The intent of this program is to give commanders the capability and flexibility to take immediate action to affect positive impacts on recovery efforts and economic initiatives in their battlespace/AOR.

*Id.* A fragmentary order (FRAGO) directs new actions within an ongoing operation and with reference to an existing operation order, providing timely changes to subordinate and supporting commanders while providing notification to higher and adjacent commands. See U.S. DEP’T OF ARMY, FIELD MANUAL 101-5, STAFF ORGANIZATION AND OPERATIONS H-2 to H-3 (31 May 1997) [hereinafter FM 101-5].

27. Established in the DOD on 20 January 2003 under the supervision of retired Lieutenant General Jay Garner, the mission of the Office of Reconstruction and Humanitarian Assistance was to “establish[] links with the United Nations specialized agencies and with non-governmental organizations that will play a role in post-war Iraq” and to “reach out also to the counterpart offices in the governments of coalition countries, and, in coordination with the President’s Special Envoy to the Free Iraqis, to the various Free Iraqi groups.” See Undersecretary of Defense (Policy) Douglas Feith, *A Commitment to Post-War Iraq: Basic Principles*, Mar. 12, 2003, available at <http://www.defendamerica.mil/iraq/irq031203.html>.

28. See, e.g., Department of Defense, Disbursement and Distribution Procedures for Office of Reconstruction and Humanitarian Assistance (ORHA) (May 2003); Interview with Lieutenant Colonel Milt Sawyers, Comptroller for 1st Armored Division, in Baghdad, Iraq (May 20, 2003) [hereinafter Interview with LTC Milt Sawyers] (describing unit-level procedures). The ORHA had received authority to determine appropriate uses of and make payments from a limited amount of vested assets designated to the Secretary of Defense from the Secretary of Treasury. See, e.g., Memorandum from Deputy Secretary of Defense to Director, Office of Reconstruction and Humanitarian Assistance and to Secretary of the Army, subject: Second Delegation of Authority to Use Vested Iraqi Property for Assisting the Iraqi People and Assisting in the Reconstruction of Iraq (8 May 2003).

29. See Interview with LTC Milt Sawyers, *supra* note 28. This summarized account of efforts to use seized funds during April and May of 2003 is not intended to gloss over the difficulties and frustrations felt by commanders and staff judge advocates in the field that arrangements were not in place beforehand or quickly enough to halt a rapid slide into lawlessness. The ill-defined relationship between tactical units and representatives from ORHA, the initial unavailability of the seized funds, and the absence of clear authority and mechanisms to apply resources to obvious problems in the street all contributed to leaders’ resolve that much could be done better if the campaign were repeated. See COL Lyle Cayce E-mail, *supra* note 24. Independent studies before and after the onset of the war have detailed useful considerations for comprehensive occupation planning, organization, and preparation. See, e.g., UNITED STATES INSTITUTE OF PEACE, SPECIAL REPORT 104: ESTABLISHING THE RULE OF LAW IN IRAQ (2003) (recording conclusions of a 19 Feb. 2003 workshop); JAMES DOBBINS, JOHN G. MCGINN, KEITH CRANE, SETH G. JONES, ROLLIE LAL, ANDREW RATHMELL, RACHEL SWANGER, & ANGA TIMILSINA, RAND STUDY—AMERICA’S ROLE IN NATION-BUILDING: FROM GERMANY TO IRAQ (2003).

30. The Coalition Provisional Authority (CPA) was formally established on 16 May 2003 with the following stated objectives and authority:

(1) The CPA shall exercise powers of government temporarily in order to provide for the effective administration of Iraq during the period of transnational administration, to restore conditions of security and stability, to create conditions in which the Iraqi people can freely determine their own political future, including by advancing efforts to restore and establish national and local institutions for representative governance and facilitating economic recovery and sustainable reconstruction and development.

(2) The CPA is vested with all executive, legislative, and judicial authority necessary to achieve its objectives, to be exercised under relevant U.N. Security Council resolutions, including Resolution 1483 (2003), and the laws and usages of war. This authority shall be exercised by the CPA Administrator.

(3) As the Commander of Coalition Forces, the Commander of U.S. Central Command shall directly support the CPA by deterring hostilities; maintaining Iraq’s territorial integrity and security; searching for, securing and destroying weapons of mass destruction; and assisting in carrying out Coalition policy generally.

COALITION PROVISIONAL AUTHORITY, REG. NO. 1, § 1, 16 May 2003, available at [http://www.cpa-iraq.org/cpa\\_documents.html](http://www.cpa-iraq.org/cpa_documents.html). The Administrator of the CPA, Ambassador L. Paul Bremer, arrived in Iraq on 12 May, having recently been named by President Bush to serve as his envoy and as the senior coalition official in Iraq. See Public Broadcasting Service Online News Update, *New U.S. Administrator Arrives In Baghdad To Stabilize Country*, May 12, 2003, available at [http://www.pbs.org/newshour/updates/bremer\\_05-12-03.htm](http://www.pbs.org/newshour/updates/bremer_05-12-03.htm); White House Office of the Press Secretary, *President Names Envoy to Iraq*, May 6, 2003, available at <http://www.whitehouse.gov/news/releases/2003/05/20030506-5.html>. The first significant description of the CPA is contained in Letter from John D. Negroponte, United States Mission to the United Nations and Jeremy Greenstock, United Kingdom Mission to the United Nations, to His Excellency Mr. Munir Akram, President of the Security Council (May 8, 2003). In the latter weeks of May, the functions and organization of ORHA were transferred to the CPA.

having been delegated authority by the Deputy Secretary of Defense over “Certain State-or Regime-Owned Property in Iraq,”<sup>32</sup> signed a memo on 16 June 2003, re-delegating some of that authority to the Commander of Coalition Forces. The memo authorized the Commander “to take all actions necessary to operate a Commanders’ Emergency Response Program.”<sup>33</sup> It elaborated that “[t]his Program will enable commanders to respond to urgent humanitarian relief and reconstruction requirements within their areas of responsibility, by carrying out programs that will immediately assist the Iraqi people and support the reconstruction of Iraq.”<sup>34</sup> The memo also set an aggregate limit on the expenditure of seized funds under the CERP and dictated total spending ceilings and transactional caps for division and brigade-level commanders.

### FRAGO 89

Three days later, on 19 June 2003, the Commander of Combined-Joint Task Force 7 (CJTF-7) implemented the CERP by issuing FRAGO 89 to the operation order in effect at the time.<sup>35</sup> Describing the CJTF-7 Commander’s intent as providing major subordinate commanders “with a greater capability and flexibility to take immediate action to make positive impacts in their area of responsibility,”<sup>36</sup> FRAGO 89 outlined permissible reconstruction projects, issued implementing tasks, and stated limitations on fund expenditures in non-technical terms. It also announced seized Iraqi assets as the source of CERP funding.<sup>37</sup>

Permissible “reconstruction assistance” was defined in FRAGO 89 as:

the building, repair, reconstitution, and reestablishment of the social and material infrastructure in Iraq. This includes but is not limited to: water and sanitation infrastructure, food production and distribution, healthcare, education, telecommunications, projects in furtherance of economic, financial, management improvements, transportation, and initiatives which further restore of [sic] the rule of law and effective governance, irrigation systems installation or restoration, day laborers to perform civic cleaning, purchase or repair of civic support vehicles, and repairs to civic or cultural facilities.<sup>38</sup>

FRAGO 89 also made clear that expenditures could include purchases of goods and services from local Iraqis.<sup>39</sup>

Subordinate commanders were directed to appoint in writing project purchasing officers (PPOs) who had previously been trained and certified as ordering officers under the Federal Acquisition Regulation and supplemental service regulations.<sup>40</sup> Each purchase was to be documented on a standard U.S. Government purchase order—the standard form (SF) 44—and purchase order procedures were generally to be followed, except

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31. See *supra* notes 16-17, 20, and accompanying text; see also COALITION PROVISIONAL AUTHORITY, ORDER NO. 2—DISSOLUTION OF ENTITIES § 2 (23 May 2003) (promulgating that all assets of named dissolved entities of the former regime shall be held by the Administrator on behalf of and for the benefit of the Iraqi people); COALITION PROVISIONAL AUTHORITY, ORDER NO. 4—MANAGEMENT OF PROPERTY AND ASSETS OF THE IRAQI BAATH PARTY § 3 (25 May 2003) (promulgating that all assets of the Iraqi Baath Party are subject to seizure by the CPA for the benefit of the Iraqi people); COALITION PROVISIONAL AUTHORITY, ORDER NO. 9—MANAGEMENT AND USE OF IRAQI PUBLIC PROPERTY (8 June 2003) (establishing orderly procedures to control occupancy of public facilities and use of public resources); S.C. Res. 1483, U.N. SCOR, 4761st mtg. U.N. Doc S/RES paras. 12 (2003) (noting the establishment of a Development Fund for Iraq), 13 (noting that the funds for the Development Fund for Iraq shall be disbursed at the direction of the [CPA] in consultation with the Iraqi interim administration), and 14 (underlining that the Development Fund for Iraq shall be used in a transparent manner to meet the humanitarian needs of the Iraqi people, for the economic reconstruction and repair of Iraq’s infrastructure, for the continued disarmament of Iraq, and for the costs of Iraqi civilian administration, and for other purposes benefiting the people of Iraq); COALITION PROVISIONAL AUTHORITY, REG. 2—DEVELOPMENT FUND FOR IRAQ (15 May 2003).

32. Memorandum, Deputy Secretary of Defense, to Administrator of the Coalition Provisional Authority, subject: Certain State- or Regime-Owned Property in Iraq (29 May 2003) (exercising authority from the Presidential Memo on Regime Property, *supra* note 16).

33. Memorandum, Administrator of the Coalition Provisional Authority, to the Commander of Coalition Forces, subject: Commanders’ Emergency Response Program (16 June 2003) [hereinafter CERP Delegation Memo]. On the same day, Ambassador Bremer established a parallel program for CPA Regional Directors as well as a Construction Initiative, both of which were also to be funded with seized assets. See Memorandum, Administrator of the Coalition Provisional Authority, to Regional Directors, subject: Regional Directors’ Emergency Response Program (16 June 2003); Memorandum, Administrator of the Coalition Provisional Authority, to Chairman, Program Review Board and Regional Directors, subject: Construction Initiative for Iraq (16 June 2003).

34. See CERP Delegation Memo, *supra* note 33.

35. Headquarters, Combined-Joint Task Force 7, Fragmentary Order 89 (Commander’s Emergency Response Program (CERP) Formerly the Brigade Commander’s Discretionary Fund) to CJTF-7 OPOD 03-036 (192346 June 03) [hereinafter FRAGO 89].

36. *Id.* para. 3.B.

37. *Id.* para. 3.B.3.

38. *Id.* para. 3.B.4.

39. *Id.* para. 3.B.5.

that the SF 44 could be used to document CERP purchases up to \$100,000,<sup>41</sup> forty times the value of the maximum micro-purchase order when appropriated funds are used.<sup>42</sup> Commanders and PPOs were ordered to take extra precautions for purchases larger than \$10,000, to include informing the division commander in advance, obtaining three competitive bids, identifying an individual to manage the project, and paying for services as progress was made rather than in a lump sum up front.<sup>43</sup> FRAGO 89 forbade the mixing of CERP funds with appropriated funds, and required PPOs to maintain separate SF 44s and document registers for the two sources of funds.<sup>44</sup>

Unit finance detachments were to train individuals other than PPOs to serve as pay agents for drawing, safeguarding, and paying the currency to be used in the CERP project purchases.<sup>45</sup> Finance standing operating procedures ensured adequate security of the funds, to include coordinating for military police or tactical maneuver units to provide point, route, or area security. To enhance security, pay agents were cautioned to draw funds as needed rather than large bulk sums.

FRAGO 89 prohibited expenditures for the following seven categories of purposes:

- the direct or indirect benefit of CJTF-7 forces, to include coalition forces;
- entertainment of local Iraqi population;
- any type of weapons buy-back program or rewards program;
- to buy firearms, ammunition, or the removal of unexploded ordnance (UXO) for any purpose;

- for duplicating services available through municipal governments;
- to provide support to individuals or private businesses (exceptions possible, i.e., repair damage caused by coalition forces);
- salaries to the civil work force, pensions, or . . . emergency civil service worker payments.<sup>46</sup>

Commanders were directed to coordinate all projects with regional offices of the CPA, with governorate support teams, and with Civil Affairs elements “to prevent duplication of effort and to ensure synchronization.”<sup>47</sup> They were also generally cautioned that “Iraqi seized assets used for this program are not unlimited,” and that they should “work to ensure reasonable prices are paid for goods/services received, and projects are constructed to a modest, functional standard.”<sup>48</sup>

Units were to report weekly to higher headquarters with the dates, locations, amounts spent, and brief descriptions of the CERP projects undertaken.<sup>49</sup> The initial amount allocated to each brigade commander (\$200,000) and division commander (\$500,000) could be replenished. Upon exhausting available funds, commanders were required to submit a CPA form for forwarding to the CPA’s newly established Program Review Board.<sup>50</sup>

In the coming month and a half, CJTF-7 issued two additional FRAGOs modifying the CERP. The first relaxed the restriction in FRAGO 89 on payment of rewards with CERP funds.<sup>51</sup> The second permitted delegation of approval authority for CERP reward payments to battalion-squadron command level.<sup>52</sup>

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40. *Id.* para. 3.C.1.B; *see* U.S. DEP’T OF ARMY, ARMY FEDERAL ACQUISITION REG. SUPP. pt. 5101.602-2-90 (Oct. 2001) [hereinafter AFARS] (containing governing guidance for Army ordering officers); GENERAL SERVS. ADMIN. ET AL, FEDERAL ACQUISITION REG. pt. 13.306 (Sept. 2001) [hereinafter FAR] (containing guidance for use of the SF 44, Purchase Order– Invoice-Voucher).

41. FRAGO 89, *supra* note 35, para. 3.D.6.

42. *See* FAR, *supra* note 40, § 13.306 (specifying that the SF 44 is to be used when “[t]he amount of the purchase is at or below the micro-purchase threshold, except for purchases made under unusual and compelling urgency or in support of contingency operations”); § 2.101 (defining the micro-purchase threshold generally as \$2,500).

43. FRAGO 89, *supra* note 35, para. 3.D.7.

44. *Id.* para. 3.D.3.F.

45. This paragraph of the text summarizes FRAGO 89, *supra* note 35, para. 3.C.

46. *Id.* para. 3.D.3.

47. *Id.* para. 3.D.1.

48. *Id.* para. 3.D.2.

49. *Id.* para. 3.D.10.

## CERP's Dramatic Impact in Iraq

From early June to mid-October, Iraqis benefited noticeably from the seized funds entrusted to commanders. More than 11,000 projects were completed in this time, resulting in the purchase of \$78.6 million of goods and services, mostly from local economies that were being brought to life after decades of centralized rule from Baghdad.<sup>53</sup>

In and around Baghdad itself, neighborhoods responded to the new decentralized activity.<sup>54</sup> Thousands of able-bodied Iraqis were paid a daily wage to clean streets, alleys, buildings, and public spaces of debris and garbage, far exceeding the scope of cleanup the Army alone could accomplish and leveraging with self-interested Iraqi hands the efforts of American sergeants and privates operating military equipment. Hundreds of small generators—many of these confiscated from abandoned Ba'athist buildings and villas—were repaired and installed in municipal buildings with Iraqi labor, enabling local communities to resume basic functions despite halting progress being made on the city's electrical grid. Many additional hundreds of air conditioners were purchased and installed in Iraqi buildings under the CERP program, providing relief from temperatures that routinely rose above a 100 degrees fahrenheit, cooling hot tempers, and permitting the application of clear-headed reason to problems of self-governance. Dozens of jails and local police stations were repaired or reconstructed, facilitating a return to public order and creating more secure and humane conditions for detained Iraqi suspects.<sup>55</sup>

Throughout the country, similar projects were feverishly underway in many brigade and division areas of operations. More than \$6 million were spent on 999 rudimentary water and sewage repair projects, providing clean water supplies and preventing the spread of dysentery, cholera and other diseases. Bridge, road, and other small-scale reconstruction projects numbered 1,758 during the first eighteen weeks of the CERP and plowed nearly \$13 million into nascent markets for building materials and labor. More than \$1 million were spent on 188 projects for distribution of humanitarian relief in places nongovernmental and international relief organizations could not reach, and another \$450,000 enabled the movement home of Iraqis displaced during the war and the transportation of supplies and equipment to locations where needed. Myriad expenditures to get local governing councils, town officials, judges, and investigators operating totaled \$4.7 million in 742 separate projects.<sup>56</sup>

The most dramatic and well-publicized uses of the CERP funds occurred in the northern part of Iraq, where the 101st Airborne Division (Air Assault) creatively partnered with—and further promoted—a sympathetic and forward-looking civilian population. As of mid-October, the division and its subordinate brigades had undertaken over 3,600 CERP projects costing more than \$28 million, roughly a third of the CERP activity countrywide.<sup>57</sup> The 101st refurbished more than 400 schools by installing or upgrading utilities, doing structural repair, and purchasing desks, chairs, and supplies. In addition to employing thousands of Iraqis, the school projects complemented similar work by nongovernmental organizations and the CPA, enabling

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50. *Id.* para. 3.D.10.B. COALITION PROVISIONAL AUTHORITY, REG. 3—PROGRAM REVIEW BOARD (19 May 2003).

The Board shall report directly to the Administrator of the CPA. The Board shall carry out its responsibilities, as defined in this Regulation, in a manner consistent with the CPA's obligation to ensure that funds available to the CPA for providing relief to, and the recovery of Iraq are managed in a transparent manner and consistent with applicable law, for and on behalf of the Iraqi people. In addition, the Board shall, when and to the extent appropriate, consult the Iraqi interim administration referred to in paragraph 9 of Resolution 1483 (2003), and shall seek every opportunity to further the CPA's objective of gradually transferring to the Iraqi interim administration the responsibility of budgeting Iraq's financial resources.

*Id.*

51. Headquarters, Combined-Joint Task Force 7, Fragmentary Order 250 (Amendment to the Commander's Emergency Response Program (CERP) Formerly the Brigade Commander's Discretionary Fund) to CJTF-7 OPORD 03-036 (011947 July 03).

52. Headquarters, Combined-Joint Task Force 7, Fragmentary Order 480 (C1 to FRAGO 250M—Amendment to Commander's Emergency Response Program) to CJTF-7 OPORD 03-036 (222351 July 03). By 18 October, reward payments totaled \$218,380. *See* Headquarters, United States Central Command, Commander's Emergency Response Program Expenditures (18 Oct. 2003) [hereinafter CERP Expenditure Table].

53. *See id.* One measure of the degree of control over the economy previously exercised by the former regime is that under the Oil-for-Food program, Iraq oil exports generated more than \$63 billion, and yet severe hardship for ordinary Iraqis in obtaining food, medicine, and essential civilian goods persisted. *See* KENNETH KATZMAN, CONGRESSIONAL RESEARCH SERVICE REPORT RL 30472: OIL-FOR-FOOD PROGRAM, INTERNATIONAL SANCTIONS, AND ILLICIT TRADE (2003).

54. Sources for this and the subsequent paragraph in the text include the CERP Expenditure Table, *supra* note 52; Interview with COL David Perkins, *supra* note 13; Interview with COL Lyle Cayce, *supra* note 21; Interview with LTC Paul Grosskruger, *supra* note 22; Interview with Colonel J.D. Johnson, Former Commander of 2d Brigade, 1st Armored Division, in Washington, D.C., on 30 January 2004 [hereinafter Interview with COL J.D. Johnson]; and author's own experiences in Iraq in 2003.

55. *See supra* note 54.

56. *Id.*

many more children to return to class in an environment conducive to learning.<sup>58</sup>

The CERP of the 101st was front-page news in the *Washington Post* on 30 October, in a story featuring the pediatric wing of a hospital in remote mountains near the Iraq-Syria border:

Within a week, a Humvee pulled up with the first installment of \$9600 in cash to fix the wing. Within four more weeks, the building was rebuilt and refurnished, complete with fuzzy blankets in primary colors and Mickey and Minnie Mouse decorations. “It happened so fast I almost couldn’t believe it,” said [Kifah Mohammad] Kato, director of the Sinjar General Hospital.<sup>59</sup>

The *Post* article contrasted the streamlined procedures under which the seized former regime cash could be spent with the delays plaguing major reconstruction funds handled by the U.S. Agency for International Development. The article also recorded concerns, voiced by humanitarian aid groups, that such streamlined procedures were ripe for abuse, in that commanders could purchase goods or services with a minimum of competitive bidding or market research.<sup>60</sup> The article mentioned, without elaboration, a trend that had pushed particular CERP projects some distance from the purpose of the program as originally articulated by the CPA Administrator. In addition to hospital refurbishment, a clearly humanitarian expenditure, the CERP had been used for “projects such as hiring a civil defense corps . . . and fixing an oil refinery and a sulfur plant.”<sup>61</sup>

Commanders and judge advocates throughout Iraq were justifying these security-oriented and larger infrastructural investments as permissible under the CERP because they were ultimately linked to the humanitarian needs of the Iraqi people. A safe, secure, economically viable country was, so the justifi-

cation went, the most humanitarian thing that could be done for ordinary Iraqis.<sup>62</sup> The volume of these “indirectly” humanitarian expenditures of the CERP was significant, as more than \$13 million of the \$78.6 million total had been spent to recruit, train, outfit, and deploy police, facility security guards, and civil defense corps units.<sup>63</sup> Additional millions had been spent on significant construction or repairs to the country’s industrial plant. Moreover, in September and October the average CERP project cost jumped from about \$4000 to over \$17,000, reflecting commanders’ increasingly ambitious efforts to address the security and infrastructural causes of Iraqi hardships in addition to immediate needs.<sup>64</sup>

Although various legal interpretations of the 16 June 2003 Bremer memorandum and FRAGO 89 are available to reconcile the CERP’s essentially humanitarian purpose with large expenditures on security and industrial infrastructure,<sup>65</sup> the awkwardness of such expenditures with CERP funds is undeniable. The CERP was established, after all, as an “emergency response” program, not a fund for capital investments in security forces and industrial capacity. In April 2003, Congress had already appropriated nearly \$2.5 billion within an “Iraq Relief and Reconstruction Fund,” which included “rule of law and governance” among its purposes; in the same legislation, Congress had provided for more than \$500 million to be spent in a “Natural Resources Risk Remediation Fund” for, among other things, “repair of damage to old facilities and related infrastructure and preserve a distribution capability.”<sup>66</sup>

Still, despite the duplication of the CERP’s security force and industrial capacity projects with funds administered outside the military command structure, Ambassador Bremer decided to reinforce the CERP’s successes.<sup>67</sup> Indeed, given the slow pace at which the non-military reconstruction efforts were proceeding, the decision was not a difficult one. Eventually, Ambassador Bremer would fund the CERP with additional mil-

57. See Major Brian Winski, Chief of Operations, 101st Airborne Division (Air Assault), 101st CERP Vignettes (11 Oct. 2003) [hereinafter 101st CERP Vignettes] (copy on file with author); see also Scheherezade Faramarzi, *Search for WMD in Iraq Slows to Crawl*, AP, Sept. 23, 2003, available at <http://www.tallahassee.com/mld/tallahassee/news/world/6838745.htm> (describing the expenditure of \$3.5 million in three months by the PPO-Pay Agent team of judge advocate Captain Julie “Moneypenney” Simoni and Chemical Corps officer Second Lieutenant Ben Shumaker in northern Iraq).

58. *Id.*

59. Ariana Eunjung Cha, *Military Puts Funds to Swift Use Rebuilding*, WASH. POST, Oct. 30, 2003, at A1.

60. *Id.* (quoting Dominic Nutt, a spokesman for British humanitarian group Christian Aid).

61. *Id.*

62. Telephone Interview with Mr. Barry Hammill, Deputy Staff Judge Advocate, U.S. Central Command (Nov. 9, 2003).

63. See 101st CERP Vignettes, *supra* note 57.

64. See CERP Expenditure Table, *supra* note 52.

65. For instance, one could argue that a daily wage is not a “salary” within the use of that term in FRAGO 89, *supra* note 35, para. 3.D.H.3. Also, FRAGO 89 contemplates use of some amount of CERP for “infrastructure.” *Id.*

66. See 2003 EWSAA, *supra* note 24, at 559, 573-74.

lions of seized assets in excess of the original spending cap for the program.<sup>68</sup>

### Funding CERP With U.S. Appropriations

Even as the CERP was attracting attention for early achievements, the program was running out of money. As commanders warmed to the program and accelerated the rate at which they reinvested the seized cash into local communities, it became clear that the assets the CPA was willing to devote to the CERP would not last beyond 2003 if the accelerated rate of spending continued.

On 17 September 2003, while the unique contributions the CERP had been making were still relatively unknown to senior policymakers and before the exhaustion of ready funding from seized assets was apparent, the President submitted a request for \$87 billion of emergency supplemental funding to Congress. More than \$20 billion of this request was for appropriations to finance the reconstruction of Iraq and Afghanistan.<sup>69</sup> Both houses of Congress deliberated on this legislation quickly, so that by the time the administration was prepared to request a specific amount of appropriated funding for the CERP, the House and Senate versions of the supplemental appropriations bill were almost ready to be sent to the joint conference charged with reconciling remaining differences.<sup>70</sup> In October, before the start of the conference, the administration persuaded managers of the House bill to include in it a draft provision autho-

rizing the expenditure of up to \$180 million of O&M funds on the CERP.<sup>71</sup> An increasing drumbeat of requests by field commanders in Afghanistan for funding to undertake CERP-like projects resulted in a requested provision that would authorize an appropriated-fund CERP for commanders in both countries.<sup>72</sup>

Upon receiving the House version of the bill, Senate Appropriations Committee staffers identified the CERP provision as one that had not been included in the President's original request. The Senate Appropriations Committee was both concerned about the diversion of O&M funding from its core purpose and acutely aware that controversial billions of dollars were elsewhere in the legislation being granted, not loaned, for the humanitarian and reconstruction needs of Iraq and Afghanistan. Consequently, the Committee requested more information on what the CERP was and on how the requested provision would be implemented if it became law.<sup>73</sup>

On 22 October 2003, members of the Joint Staff briefed Senate staffers on the CERP and answered questions about the requested funding authority. The Joint Staff outlined the 16 June 2003 Bremer memo and the essential guidance contained in FRAGO 89.<sup>74</sup> Representative projects were described by officers who had personal experience with the CERP in Iraq, and the value of the program was related as that of a stabilization phase "tool" no less essential to victory than the world's finest tanks, weapons, ships, planes, communications, and individual protective gear with which Congress had already

67. See Dennis Steele, *The Race to Win*, ARMY, Nov. 2003, at 9, 11 (quoting Major General Petraeus' comment "I told Ambassador Bremer that money is ammunition during his first visit [to Mosul], and that we didn't have much. He went back to Baghdad, and money started to flow.")

68. See, e.g., Memorandum, Administrator of the Coalition Provisional Authority, to the Commander of Coalition Forces, subject: Amendment of Commanders' Emergency Response Program (7 July 2003) (increasing the cap to \$11.5 million). The original delegation of authority from the CPA was for an amount not to exceed ten dollars. See CERP Delegation Memo, *supra* note 33. The CPA also took actions to ensure that CERP was not encumbered with additional layers of regulation:

Contracting Guidance will be voted on at the next meeting to incorporate a grandfathering of the Commander's Emergency Response Program (CERP) and allow the CERP to be administered in accordance with Fragmentary Order that CJTF-7 previously propagated directing procedures for executing the CERP. And, at the Chairman's suggestion, the new guidance will have a protest mechanism in place which will not result in the suspension of any contracting activities during resolution of any protests.

Coalition Provisional Authority, Program Review Board Minutes, 16 Aug. 2003.

69. In the weeks that followed, the President and others drew analogies about the generosity of the legislation that resulted from this request and its comparability to the Marshall Plan. See, e.g., The White House, Remarks by the President at the Signing of H.R. 3289 (Nov. 6, 2003) ("Our investment in the future of Afghanistan and Iraq is the greatest commitment of its kind since the Marshall Plan.") [hereinafter Presidential Signing Statement]. The parallels and differences between the United States' support to Iraq and Afghanistan reconstruction and that to Germany's reconstruction after World War II will be a fertile topic for future research. Lieutenant Colonel Walt Hudson, former Deputy Staff Judge Advocate of 1st Armored Division in Iraq and currently on the faculty of the Command and General Staff College, surmises that General Lucius D. Clay "derived a kind of CERP authority" from a directive that empowered Clay to prevent disease and unrest in occupied Germany. See E-mail from Lieutenant Colonel Walter Hudson to Author (14 Jan. 2004) (on file with author) (interpreting *Joint Chiefs of Staff, Directive 1067, Directive to the Commander-in-Chief of the United States Forces of Occupation Regarding the Military Government of Germany (10 May 1945)* in U.S. DEP'T OF STATE, DOCUMENTS ON GERMANY 1944-1985 (1985), citing John Backer, *Morgenthau Plan to Marshall Plan*, in AMERICANS AS PROCONSULS: UNITED STATES MILITARY GOVERNMENT IN GERMANY AND JAPAN, 1944-1952 (1984)).

70. See Interview with Rear Admiral Peter H. Daly, Joint Staff Force Structure, Resources, and Assessment Directorate, in Washington, D.C. (Oct. 22, 2003).

71. See H.R. REP. NO. 108-312 (2003).

72. See Interview with Colonel Steven Schrader, U.S. Air Force, Joint Staff Strategic Plans and Policy Directorate, in Washington, D.C. (Sept. 27, 2003).

73. See E-mail from Mr. Bob Henke, Senate Appropriations Committee, to Mr. Stephen Moffitt, Office of the Secretary of Defense, Legislative Affairs (Oct. 20, 2003) (copy on file with author).

equipped the military. When spent well, CERP funding convinced Iraqis that the coalition was truly committed to their well-being, increased the flow of intelligence to commanders and soldiers about hostile actors in the community, and improved security and economic conditions.<sup>75</sup>

To the question of why O&M funds should be the source of funding, the Joint Staff explained that commanders and tactical unit comptrollers were familiar with its use, accountability, and management. The Joint Staff answered concerns about safeguarding and prevention of abuse by describing the training and separate functions of ordering officers and pay agents as well as the simple but adequate procedures for securing cash, obtaining maximum results from purchases, documenting transactions, and investigating any irregularities.<sup>76</sup>

The Senate was particularly cautious of the administration's request that O&M funding be available for use "notwithstanding any other provision of law."<sup>77</sup> In both its oral replies and a follow-up written submission, the Joint Staff maintained that this phrase was essential to keeping the CERP a flexible and responsive tool, unencumbered by procedures normally associated with procurement, the payment of claims, or other official actions that involve the expenditure of appropriated funds.<sup>78</sup>

The day following the briefing, the Joint Staff received word that the Senate would recede to the House version of the CERP provision, which had amended the administration's request by adding a quarterly reporting requirement.<sup>79</sup> Following a week of intense activity and debate on other aspects of the legislation, section 1110 of the bill that was passed by both houses gave

commanders the full requested authority to continue CERP with appropriated funds:

During the current fiscal year, from funds made available in this Act to the Department of Defense for operation and maintenance, not to exceed \$180,000,000 may be used, notwithstanding any other provision of law, to fund the Commander's Emergency Response Program, established by the Administrator of the Coalition Provisional Authority for the purpose of enabling military commanders in Iraq to respond to urgent humanitarian relief and reconstruction requirements within their areas of responsibility by carrying out programs that will immediately assist the Iraqi people, and to establish and fund a similar program to assist the people of Afghanistan: *Provided*, That the Secretary of Defense shall provide quarterly reports, beginning on January 15, 2004, to the congressional defense committees regarding the source of funds and the allocation and use of funds made available pursuant to the authority in this section.<sup>80</sup>

On 6 November 2003, the President signed the bill into law<sup>81</sup> and, for the first time, federal appropriations of the U.S. government could lawfully fund the CERP projects in Iraq and Afghanistan.

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74. See Joint Staff, Commanders' Emergency Response Program (CERP), Briefing for Senate Appropriations Committee (Oct. 22, 2003) (Powerpoint presentation and author's notes from the session, on file with author).

75. See *id.*

76. See *id.*

77. See *infra* text accompanying note 80.

78. See Joint Staff, Questions and Answers, 23 Oct. 2003 (on file with author). One of seven responses to questions was as follows:

*Notwithstanding Any Other Provision of Law.* OGC, the General Counsel for CPA, and OCJCS Legal Counsel all believe that the language is important because Commanders using CERP funds right now are not using Armed Services Procurement Act, Competition in Contracting Act, Foreign Claims Act, and myriad other procedures that would arguably be required by law and implementing regulations (e.g., the Federal Acquisition Regulation) were CERP to be funded with U.S. appropriations. Also without the "notwithstanding" language, various provisions of past, current and even future Foreign Operations Appropriations Acts or organic Foreign Assistance legislation, could arguably be said to apply to the program were it to become funded, as proposed, with appropriated funds. In short, the "notwithstanding" phrase is intended to keep the program the useful tool that it is for commanders in the field and not have it encumbered by processes and procedures in other provisions of law.

*Id.*

79. See H.R. CONF. REP. 108-337, at 7 (2003); E-mail from Rear Admiral Peter H. Daly, Joint Staff Force Structure, Resources, and Assessment Directorate, to author (24 Oct. 2003) (on file with author).

80. Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, 2004, Pub. L. No. 108-106, § 1110, 117 Stat. 1209, 1215 [2004 ESAA].

81. See Presidential Signing Statement, *supra* note 69.

On 25 November 2003, Under Secretary of Defense Zakheim issued guidance on the use of appropriated funds in the CERP. Recognizing that CERP was “a very powerful tool for the military commanders in carrying out their current security and stabilization mission,” the Under Secretary expressed the Department’s intent that appropriated CERP funding “preserve[] the same flexibility and responsiveness . . . maintained with the original CERP that was funded with seized Iraqi assets.”<sup>82</sup> Similar to FRAGO 89 with regard to permissible project categories and limitations,<sup>83</sup> the guidance also tasked U.S. Central Command and the Department of the Army to develop operating procedures to govern the use of appropriated funds within the program.<sup>84</sup>

### Significance of CERP

Having been hailed for its potent contributions to stabilization efforts in Iraq, the CERP became, in section 1110, both a significant development in the law and a potentially transforming influence on modern U.S. military operations. The significance and potential operational impact of the legislative

provision can be appreciated against the background of restrictions historically imposed on a U.S. field commander’s ability to spend public funds.

Under normal circumstances, a brigade commander<sup>85</sup> with forces in Baghdad or Mosul or Kandahar has no source of discretionary funding to apply toward his mission. Indeed, his environment is cash-free or cash-starved, depending on the point of view. He and his soldiers generally have the finest equipment in the world, but without having to make decisions about paying for the tanks, helicopters, vehicles, machineguns, rifles, artillery pieces, mortars, missiles, radars, radios, global positioning system receivers, night vision devices, or other “end items” used by his soldiers. Funds for these capital expenditures and for their distribution and fielding to tactical units are paid for with procurement dollars appropriated by Congress either programmatically or in “other procurement” appropriations.<sup>86</sup>

Unless a commander’s prior assignments included a tour with a higher headquarters involved in researching, developing, testing, or evaluating a weapon system, vehicle, or piece of

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82. See Memorandum, Under Secretary of Defense (Comptroller), to Commander, U.S. Central Command and Secretary of the Army, subject: Guidance on the Use of Appropriated Funds for the Commander’s Emergency Response Program (CERP) (25 Nov. 2003) [hereinafter USDC Guidance Memo].

83. Importantly, Under Secretary Zakheim’s guidance stated that the CERP as executed with appropriated funds must not include rewards programs, *see id.* at 2, so as to comply with congressional intent. In 2002, Congress created specific statutory authority for the Secretary of Defense and certain delegees, to pay a monetary amount, or provide a payment-in-kind, to a person as a reward for providing U.S. government personnel with information or nonlethal assistance that is beneficial to operations or activities of the armed forces conducted outside the United States against international terrorism or to force protection of the armed forces. See Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, 116 Stat. 2655 (2002) (enacting and codifying 10 U.S.C. § 127b (LEXIS 2004)). The DOD Rewards Program thus authorized has been implemented by subsequent guidance, which directs that the Under Secretary of Defense (Comptroller) will provide funds to the Director, Washington Headquarters Services, which will then allocate funds to the combatant commanders at the direction of the Assistant Secretary of Defense for Special Operations and Low Intensity Conflict. See Memorandum, Under Secretary of Defense (Policy), for Director of the Joint Staff, subject: Implementation of the DOD Rewards Program (Mar. 5, 2003).

84. See USDC Guidance Memo, *supra* note 82. The U.S. Central Command subsequently issued messages governing use of appropriated funds within the CERP in Iraq. See Message, 092024Z Dec. 03, Headquarters U.S. Central Command to Commander, CJTF-7, subject: Combined Forces Command Fragmentary Order 09-432 Commander’s Emergency Response Program (CERP)- Appropriated Funds (CERP-APF), and establishing a CERP in Afghanistan; Message, 092041Z Dec. 03, Headquarters U.S. Central Command to Commander, ARCENT and CJTF-180, subject: Combined Forces Command Fragmentary Order 07-231 Commander’s Emergency Response Program (CERP)- Appropriated Funds (CERP-APF).

Under Secretary Zakheim’s memorandum and the U.S. Central Command message to CJTF-7 were careful to state that they applied only to situations in which appropriated funds were being used to fund the CERP. In Iraq, the CPA approved additional non-appropriated assets for use within the existing CERP. See, e.g., Coalition Provisional Authority, Program Review Board Minutes, 11 Nov. 2003, funding request #550 (approval of \$36.5 million); Coalition Provisional Authority, Program Review Board Minutes, 6 Dec. 2003, funding request #576 (approval of \$160 million). The Commander of CJTF-7 implemented the new USCENCOM and CPA guidance in Headquarters, Combined-Joint Task Force 7, Fragmentary Order 1268 (CERP Program Update DFI, Appropriated and Seized) to CJTF-7 OPOD 03-036 (221400 Dec. 03). As the Pentagon, USCENCOM, and the CPA worked out the details of the new, appropriated-fund CERP, the program continued to attract media attention. See, e.g., Greg Jaffe & Neil King, *U.S. Commanders Get More Funding for Iraqi Projects*, WALL ST. J., Dec. 9, 2003, at 1. This article states:

The Bush administration is scrambling to award about 25 multiyear contracts to do nearly \$18 billion of work in Iraq. Those contracts—for projects as varied as roads and hospitals to new power plants and waterworks—aren’t scheduled to be awarded until early February, and the process is already running slightly behind schedule. Even if awarded in February, work won’t begin in most cases until the summer . . . Based on the success of the [CERP] initiative, some senior Pentagon officials are pushing to get even more money to senior military commanders for civic-work projects. These officials contend that the division commanders, who have large staffs and extensive contacts with Iraqis in the areas they oversee, can spend money more quickly and efficiently than the Coalition Provisional Authority.

*Id.* See also Dan Murphy, *The GI’s Weapon of Choice In Iraq: Dollars*, CHRISTIAN SCIENCE MONITOR, Jan. 29, 2004, at 1. It states in pertinent part:

To the soldier on the ground, the most useful side to the money is that it has at least made some friends in communities who have profited from their projects, turning them into useful informants against insurgents operating in their areas and setting up what they hope will be a virtuous cycle of development leading to peace and then leading to more development.

*Id.*

equipment on his brigade's property books, he will have needed to serve no role whatsoever in spending billions of RDTE dollars.<sup>87</sup> Nearly a century ago, western industrial nations centralized weapons design, procurement, and fielding as part of a revolution in military affairs,<sup>88</sup> and the DOD continues to refine the process.<sup>89</sup> So long as their soldiers are well-equipped and weapons development incorporates lessons learned from the field, officers in command are satisfied to leave management of the enormous resources involved in weapons and equipment programs to others.<sup>90</sup>

The brigade's soldiers patrolling streets and raiding terrorist hideouts are paid with military personnel appropriations within a well-established and well-maintained pay and benefits apparatus.<sup>91</sup> A brigade commander need have no direct function in this apparatus—direct deposit of monthly earnings long ago made unit pay officers unnecessary—though a commander's promotion, evaluation report, and other personnel and disciplinary decisions impact the earnings of particular soldiers.

Contracts centrally planned, competed, managed, and paid for two to four echelons above the brigade level typically fur-

nish most necessary lodging, food, and other life support,<sup>92</sup> once the tactical situation permits construction of base camps. A brigade commander and his subordinate leaders will have helped define the requirements for these procurements, but without any role in fund management or disbursement. A number of civilian personnel paid under contract accompany the unit to the field, providing maintenance and other services associated with the brigade's more sophisticated command and control and other systems. These contracts, too, are concluded by warranted contracting officers distant from the brigade.

The brigade commander does have substantial influence over millions of dollars appropriated by Congress to the U.S. Army in the O&M account and then made available to the brigade through a process of apportionment, allocation, allotment, and finally budget execution within informal subdivisions of funds known as allowances.<sup>93</sup> With these funds, and according to priorities set by the command, the brigade's supply and maintenance personnel order repair parts, ammunition, fuel, batteries, field rations, barrier material, soldier hygiene items, medical supplies, and myriad other items required by the brigade for day-to-day activities.

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85. The brigade normally controls from two-to-five attached battalions, themselves units composed of four-to-five companies. Within the U.S. Army's force structure, the brigade is significant because of its ability to operate both independently or as part of a division. The brigade fights combined arms battles and engagements, integrating and coordinating different kinds of battalions—field artillery, aviation, engineer, air defense, combat air support, and naval gunfire—to accomplish its combat mission. The brigade is the first level of command that requires the commander to integrate all of the battlefield operating systems (intelligence, maneuver, fire support, mobility/countermobility/survivability, air defense, combat service support, and command/control), and the brigade provides the link between the division deep and close battle. Because the only permanently assigned element of the divisional brigade is the headquarters and headquarters company, the brigade can accommodate a variety of task organizations depending on the mission, the enemy, the terrain, troops and time available, and civilian considerations (METT-TC situation). According to Army doctrine, the brigade commander is responsible for setting the conditions necessary for these assets to make their contributions to the battle in an organized and synchronized fashion; he is also responsible for placing the battalions in the right place, at the right time, and in the right combination to decisively defeat the enemy. In short, the brigade commander commands a powerful combined arms team—frequently anywhere from 3000 to 5000 personnel and hundreds of vehicles and weapons systems—that is also adaptable to a variety of unorthodox missions. See generally U.S. DEP'T OF ARMY, FIELD MANUAL 7-30, THE INFANTRY BRIGADE ch.1 (31 Oct. 2000).

86. See, e.g., Department of Defense Appropriations Act, 2003, Pub. L. No. 107-248, 116 Stat. 1519, 1527 [hereinafter FY 03 DOD Appropriations Act] (appropriating \$1.096 billion for procurement of missiles), 1528 (appropriating \$5.874 billion for "Other Procurement").

87. See *id.* at 1532 (appropriating \$7.670 billion for Army research, development, test, and evaluation (RDTE)). Note that many brigade commanders choose to stay as actively involved as possible in providing feedback to RDTE and fielding efforts, even if they directly manage no funds in the process. Program managers of major weapons and equipment systems frequently assist field commanders' involvement. See, e.g., Colonel Gregory Fritz, *The Rapid Fielding Initiative*, ARMY AL&T (Nov.-Dec. 2003).

88. See Michael Geyer, *German Strategy in the Age of Machine Warfare, 1914-1945*, in MAKERS OF MODERN STRATEGY 541 (P. Paret ed., 1986).

89. See, e.g., VALERIE BAILEY GRASSO, CONGRESSIONAL RESEARCH SERVICE REPORT 1B96022: DEFENSE ACQUISITION REFORM—STATUS AND CURRENT ISSUES (2002).

90. See Interview with COL J.D. Johnson, *supra* note 54.

91. See, e.g., 10 U.S.C. §§ 31-88 (2000); FY 03 DOD Appropriations Act, *supra* note 86, at 1519 (appropriating \$26.9 billion for Army personnel pay, allowances, etc.); U.S. DEP'T OF DEFENSE, REG. 7000.14-R, FINANCIAL MANAGEMENT REGS. (2002) [hereinafter FMR] (containing military pay policies and procedures).

92. Authority to contract is vested in heads of agencies (e.g., Secretaries of Defense, Army, Navy, and Air Force), see U.S. DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. 202.101 (Oct. 2001) [hereinafter DFARS], who in turn establish Heads of Contracting Activities (HCAs), see *id.*, who in turn appoint Principal Assistants Responsible for Contracting (PARC), see AFARS, *supra* note 40, § 5101.601(4), who in turn select and appoint contracting officers who may bind the government to the extent of the authority delegated to them in their certificates of appointment. See FAR, *supra* note 40, subsecs. 1.603-3, 1.602-1(a). Although an Army division table of organization contains one authorization for a contracting officer, procurement activity is typically centralized at Corps or Theatre level with the result that contracting officers combine efforts in contracting offices located in headquarters one or more echelons above division. U.S. DEP'T OF ARMY, FIELD MANUAL 100-10-2: CONTRACTING SUPPORT ON THE BATTLEFIELD 2-7, 2-9, 2-10 & D-3 to D-4 (15 Apr. 1999) [hereinafter FM 100-10-2]. Funding for major life support contracts is typically from O&M and military construction appropriations.

93. See 31 U.S.C. §§ 1512, 1514; GENERAL ACCOUNTING OFFICE, A GLOSSARY OF TERMS USED IN THE FEDERAL BUDGET PROCESS, PAD-81-27, at 34 (1981); FMR, *supra* note 91, vol. 3, ch. 13.

Although most of the brigade's budgeted O&M funds are expended through the charging of accounts maintained within the military's supply and distribution systems, designated brigade personnel will have made small purchases prior to deployment on the open economy using government-wide commercial purchase cards.<sup>94</sup> Following deployment, occasional trips by purchase card holders to and from developed countries might enable a few commercially purchased supplies to reach the brigade area.

In the cash-based economies of Iraq or Afghanistan, the brigade can spend O&M funds locally outside military supply systems only through designated ordering officers and pay agents according to field ordering procedures.<sup>95</sup> Local purchases for various unit needs—ice, fans, cleaning supplies, office products, and even pack animals to support movement in difficult terrain—are classic uses of these procedures.

As Army brigade judge advocates know, however, ordering officers and pay agents are trained that disciplinary or adverse administrative action will follow a purchase made for other than official Army purposes.<sup>96</sup> These purposes are defined by federal law and congressional intentions regarding the proper uses of O&M appropriations.

According to the authoritative Comptroller General decision resulting from perceived misuse of O&M funds in the 1980s, the correct analysis of purpose is “whether a certain expense is necessary or incidental to the proper execution of the object of the appropriation (here, those expenses necessary for the O&M of the various military departments).”<sup>97</sup> The *Alexander* decision, so-called because it was issued in reply to an inquiry by Congressman Bill Alexander, applied the well-established doctrine of federal appropriations law that in order to be “necessary and incidental,” an expenditure—

- must be reasonably related to the purposes for which the appropriation was made;
- must not be prohibited by law; and,
- must not fall specifically within the scope of some other category of appropriation.<sup>98</sup>

Applying this doctrine to particular Army and Navy expenditures connected with exercises in Honduras, the Comptroller General decision held that expenses for the provision of civic and humanitarian assistance and for training Honduran forces had been charged to the DOD's O&M funds in violation of 31 U.S.C. § 1301—the “purpose” statute.<sup>99</sup> Although stopping short of finding a similar violation in use of such funds for the building of base camps, airfield runways, and other projects benefiting the Honduran military, the *Alexander* decision was critical of the Department's justifications that O&M funds could be used for this construction.<sup>100</sup>

Though subsequent legislation has superseded particular parts of the *Alexander* ruling,<sup>101</sup> the decision continues to cast a long shadow over tactical unit expenditures in the field. Thus, in the absence of the CERP, a brigade commander in Iraq would not have authority or funding at his level to pay day-laborers for garbage cleanup, purchase generators for emergency electricity, or acquire local supplies and labor to make jails capable of humanely and securely detaining apprehended criminal suspects.<sup>102</sup>

Without the CERP, rudimentary water and sewage repair projects could be undertaken by the brigade only after receiving approval at higher division, CJTF-7, and USCENTCOM headquarters, with coordination required at the Joint Staff, the Office of the Secretary of Defense, and the Defense Security Cooperation Agency.<sup>103</sup> Training or equipping new Iraqi secu-

94. See DFARS, *supra* note 92, §§ 213.270, 213.301; AFARS, *supra* note 40, subpt. 5113.270.

95. See generally FAR, *supra* note 40, pt. 13; FM 100-10-2, *supra* note 92, at 2-18.

96. U.S. DEP'T OF ARMY, FEDERAL ACQUISITION REG. MANUAL No. 2—CONTINGENCY CONTRACTING ch. 5 & app. G (Nov. 1997).

97. *The Honorable Bill Alexander, House of Representatives*, 63 Comp. Gen. 422, 427 (1984).

98. *Id.* at 427-28 (citing 42 Comp. Gen. 226, 228 (1962) and 38 Comp. Gen. 782, 785 (1959)).

99. *Id.* at 423.

100. *Id.*

101. See, e.g., 10 U.S.C. § 401 (2000) (Humanitarian and Civic Assistance in Conjunction with Military Operations) (originally enacted in Pub. L. No. 99-661, div. A, tit. III, sec. 333(a)(1), 100 Stat. 3857 (1986)); 10 U.S.C. § 2805(a)2 & (c)(2) (Exercise-Related Construction) (subsections originally enacted in Pub. L. No. 100-180, div. B, subdiv. 3, tit. I, sec. 2310, 101 Stat. 1217 (1987)); 10 U.S.C. § 2011 (Special Operations Forces: Training with Friendly Foreign Forces) (originally enacted in Pub. L. No. 102-190, div. A, tit. X, sec. 1052(a)(1), 105 Stat. 1470 (1991)); 10 U.S.C. § 2561 (Humanitarian Assistance) (originally enacted in Pub. L. No. 102-484, div. A, tit. III, sec. 304(c)(1), 106 Stat. 2361, sec. 2551 (1992)).

102. As discussed in *supra* note 24 and accompanying text, the argument that commanders and the ordering officers in their commands could use O&M funds for these expenditures strictly on the basis of the United States' obligations as an occupying power was so uncertain—particularly after passage of the Emergency Wartime Supplemental Appropriations Act on 16 April—as to inhibit the spending of such funds. This occupation responsibility argument, of course, is not even available for commanders in Afghanistan.

rity forces by U.S. soldiers and using either U.S. equipment or items purchased with O&M funds to resource this effort, even if motivated by humanitarian response, would be off-limits for the reasons enunciated in *Alexander*.<sup>104</sup> This is security assistance that Congress funds with specific appropriations for foreign operations.<sup>105</sup> Congress similarly intends that military units not undertake development or infrastructure construction projects, which are typically funded within programs managed by the State Department and the U.S. Agency for International Development.<sup>106</sup>

These fiscal law constraints are real, and commanders know that to circumvent or defy them is to risk serious censure. Although criminal penalties for Anti-Deficiency Act violations are unlikely, the prospect of an investigation—followed potentially by a formal reprimand, adverse evaluation report, and dimmed promotion chances<sup>107</sup>—deters commanders from expending government funds and other resources for humanitarian and related projects. Nonappropriated fund and private funding options are unavailable to commanders for a host of reasons.<sup>108</sup>

The significance of the CERP is that by authorizing and funding a program for discretionary humanitarian projects of brigade and division commanders, Congress has acknowledged the need for new and different tools to conduct major stability operations. Authority to use a certain amount of O&M funds “notwithstanding any other provision of law” is indispensable to ensuring the CERP remains effective despite overlapping rules and policies that place similar authority elsewhere.

Congressional acknowledgment of the need for new tools is essential because while the Constitution vests authority over foreign affairs and national defense in the President,<sup>109</sup> it also vests separate, broad authority over the purse in the Congress.<sup>110</sup> With the military’s traditional role of preparing for and fighting the nation’s wars continuing to define defense budgets and funding mechanisms,<sup>111</sup> it is the “non-traditional” military operations that bring into highest relief this congressional power to influence foreign affairs and national defense through the appropriations process.

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103. See generally Message, 100935Z Mar. 03, Assistant Secretary of Defense for Special Operations & Low-Intensity Conflict, subject: Guidance for FY04 Overseas, Humanitarian, Disaster, and Civic Aid (OHDACA) Activities. The U.S. Central Command’s implementation of this Assistant Secretary of Defense guidance makes clear that except for de minimis Humanitarian and Civic Assistance, all projects require interagency approval:

Authority for approval and execution of HCA projects has not been delegated for any countries in the USCENTCOM [area of responsibility]. Project proposals for all HCA must be nominated to the interagency for approval by USCENTCOM. HCA Activity, except de minimis, shall not be conducted prior to receipt of interagency approval.

See Message 222048Z Mar. 03, Headquarters, U.S. Central Command, subject: USCENTCOM Guidance for Humanitarian Assistance During Operation Enduring Freedom (OEF) and Operation Iraqi Freedom (OIF), para. 3.b. De Minimis Humanitarian and Civic Assistance is that provided under 10 U.S.C. § 401(c)(2) and incurring only minimal expenditures for incidental costs, such as a unit doctor’s examination of villagers for a few hours, with the administration of several shots and the issuance of some medicine, but not the deployment of a medical team for the purpose of providing mass inoculations to locals. See U.S. DEP’T OF DEFENSE, DIR. 2205.2, HUMANITARIAN AND CIVIC ASSISTANCE (HCA) PROVIDED IN CONJUNCTION WITH MILITARY OPERATIONS para. E1.1.1 (6 Oct. 1994) [hereinafter DOD DIR. 2205.2]; U.S. DEP’T OF DEFENSE, DEFENSE SECURITY COOPERATION AGENCY, MANUAL 5105.38, SECURITY ASSISTANCE MANAGEMENT MANUAL ch. 12 (2003) [hereinafter SAMM] (regulating Humanitarian Assistance and Mine Action programs).

104. 10 U.S.C. § 2011; see *supra* note 101. This statute authorizes training with friendly foreign forces by U.S. special operations forces—not by U.S. Army line brigades—and only if the primary purpose to train the U.S. special operations forces themselves. Special operations forces have, as part of their mission essential task list the task of training foreign forces, and it is the need to remain competent at this task that justifies an exception to the general rules governing security assistance. Again while training of an occupied state’s security forces is arguably a responsibility of the occupying power if indigenous forces are needed to restore order, see Hague Regulations, *supra* note 4, art. 43 (“The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.”), the authority to use brigade O&M funds in this fashion is far from clear.

105. “Security assistance” describes a

[g]roup of programs authorized by the Foreign Assistance Act of 1961, as amended, [codified at 22 U.S.C. §§ 2151 *et seq*] and the Arms Export Control Act of 1976, as amended [codified at 22 U.S.C. §§ 2751 *et seq*] or other related statutes by which the United States provides defense articles, military training, and other defense-related services, by grant, loan, credit, or cash sales in furtherance of national policies and objectives.

See JOINT PUB. 1-02, *supra* note 3, at 400. Each year, Congress appropriates money to the programs, for expenditure by agencies subordinate to the Department of State. See, e.g., Consolidated Appropriations Resolution 2003, Division E—Foreign Operations, Export Financing, and Related Programs Appropriations 2003, Title III—Military Assistance, Pub. L. No. 108-7, 117 Stat. 11, 176 [hereinafter FOAA 2003] (appropriating \$ 4.072 billion for the Foreign Military Financing Program). Some of this money may be apportioned to the DOD for execution, but it will be strictly within the context of the program administered by the Department of State. See SAMM, *supra* note 103, para. C.9.7.2.8.4; see also DEFENSE INSTITUTE OF SECURITY ASSISTANCE MANAGEMENT, THE MANAGEMENT OF SECURITY ASSISTANCE chs. 1-3 (2003); U.S. Dep’t of Defense, Security Cooperation Guidance (Apr. 2003).

106. See, e.g., Foreign Assistance Act §§ 531-35 (22 U.S.C. §§ 2346-46d).

107. See 14 FMR, *supra* note 91, chs. 1-9; U.S. DEP’T OF DEFENSE, DIR. 7200.1, ADMINISTRATIVE CONTROL OF APPROPRIATIONS 1995; 31 U.S.C. § 1349 (subjecting individuals to “appropriate administrative discipline including, when circumstances warrant, suspension from duty without pay or removal from office”).

The Constitution provides that “[n]o Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law.”<sup>112</sup> Though its impact in the realm of national security affairs has been the subject of much debate, the most persuasive view is that this “Appropriations Clause” gives Congress alone the constitutional authority to draw funds from the Treasury.<sup>113</sup>

Laws implementing the Appropriations Clause include those requiring public funds to be spent according to the purposes for which they were appropriated (purpose-based controls),<sup>114</sup> to be obligated during their period of availability (time-based controls),<sup>115</sup> and to remain within the appropriated amount (amount-based controls).<sup>116</sup> To our brigade command-

ers conducting stability operations in Iraq and Afghanistan, these and the other controls in federal appropriations law<sup>117</sup> mean that with regard to public funds under their control, they must refrain from exercising the initiative that infuses almost every other aspect of effective command.

As the Supreme Court has made clear, “[t]he established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress.”<sup>118</sup> This rule, surely a sound and proper one to safeguard the people’s treasure in a constitutional democracy, requires no special supplementation during peacetime training and exercises. But during unorthodox operations

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108. Nonappropriated fund instrumentalities (NAFIs) of the United States, such as installation morale welfare funds and the Army Air Force Exchange Service, generate revenue that remains outside the body of funds appropriated by Congress. Nonappropriated fund instrumentalities are not available as a source of funding for command expenditures on a foreign populace because NAFIs are governed by councils that implement law and written policy and are intended to provide morale-building welfare, religious, educational, and recreational programs to improve well-being of U.S. military and civilian personnel and their dependents. See generally U.S. DEP’T OF ARMY, REG. 215-1, MORALE, WELFARE, AND RECREATION ACTIVITIES, AND NON-APPROPRIATED FUND INSTRUMENTALITIES (25 Oct. 1998). Private organizations are not an available source of funding to a commander because they must determine how their own funds are spent based upon their own constitutions, bylaws, and procedures. See, e.g., U.S. DEP’T OF DEFENSE, INSTR. 1000.15, PRIVATE ORGANIZATIONS ON DOD INSTALLATIONS (23 Oct. 1997). Nor can commanders conduct fundraisers or solicit contributions from soldiers or non-federal entities. See U.S. DEP’T OF DEFENSE, DIR. 5035.1, COMBINED FEDERAL CAMPAIGN (CFC) FUND-RAISING WITHIN THE DEPARTMENT OF DEFENSE (7 May 1999); U.S. DEP’T OF DEFENSE, REG. 5500.7-R, JOINT ETHICS REGULATION ch. 2 (1994); Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. 2635 (2003).

The Secretary of Defense has authority to accept contributions of money or real or personal property, see, e.g., 10 U.S.C. § 2608, as do the service secretaries, see *id.* § 2601, but such gifts are not accessible to commanders without extensive coordination with higher headquarters, the donors typically wish to attach strings that may or may not be acceptable to the military department involved, and once the gift is given, there are additional issues of securing it and transporting it. The Secretary of Defense and the Service Secretaries have emergency and extraordinary expense authority, see *id.* § 127. With this authority they have established official representation funds in order to host official receptions, dinners, and similar events and otherwise extend official courtesies to guests of the United States for purposes of maintaining the standing and prestige of the United States and the DOD. See, e.g., U.S. DEP’T OF DEFENSE, DIR. 7250.13, OFFICIAL REPRESENTATION FUNDS (ORF) (10 Sept. 2002). The amounts, however, are limited and strictly regulated to ensure expenditure for the designated purpose. *Id.*

109. Colonel Richard D. Rosen, *Funding “Non-Traditional” Military Operations: The Alluring Myth of a Presidential Power of the Purse*, 155 MIL. L. REV. 1, 115 (1998).

110. See *id.* 116. See also Phillip R. Trimble, *The President’s Foreign Affairs Power*, 83 AM. J. INT’L L. 750, 751 (1989).

An effective foreign policy requires more than ideas and pronouncements. It requires institutions, agencies, people and money, and Congress controls them all. Through the authorization and appropriation process, Congress sets the terms of commerce; it provides military forces and intelligence capabilities; and it establishes the conditions for development assistance, security support programs and U.S. participation in international organizations. . . . Hardly any important executive branch decision is taken without consideration of the reaction in Congress.

*Id.*

111. See Rosen, *supra* note 109, at 3-6 & n.30 (“The military’s traditional role of preparing for and fighting the nation’s wars will undoubtedly continue to define defense budgets and funding mechanisms; however, America’s military also will find itself increasingly absorbed in operations unrelated to its core missions.”) (citing Samuel P. Huntington, *Keynote: Non-Traditional Roles for the U.S. Military in NON-COMBAT ROLES FOR THE U.S. MILITARY IN THE POST-COLD WAR ERA* 6-7 (James R. Graham ed., 1993)).

112. U.S. CONST. art. I, § 9, cl. 7.

113. See Rosen, *supra* note 109, at 14-26.

114. 31 U.S.C. § 1301 (2000); see also the three-part test for a proper purpose enunciated by the Comptroller General at *supra* note 98 and accompanying text.

115. 31 U.S.C. § 1502(a) (setting forth the bona fide needs rule).

116. *Id.* § 1341(a)(1)(A) (prohibiting any government officer or employee from making or authorizing an expenditure or obligation in excess of the amount available in an appropriation); *id.* § 1514(a) (prohibiting making or authorizing expenditures or incurring obligations in excess of formal subdivisions of funds); *id.* § 1341(a)(1)(B) (prohibiting incurring an obligation in advance of an appropriation); *id.* § 1342 (prohibiting the acceptance of voluntary services unless otherwise authorized by law). An appropriation, the most common form of budget authority, is a statutory authorization “to incur obligations and make payments out of the Treasury for specified purposes.” 1 GENERAL ACCOUNTING OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 2-3 to 2-13 (2d ed., 1991) [hereinafter FED. APPROP. LAW] (quoting GENERAL ACCOUNTING OFFICE, A GLOSSARY OF TERMS USED IN THE FEDERAL BUDGET PROCESS 42 (1981)). Other types of budget authority are borrowing authority, contract authority, and spending authority from offsetting collections. See OFFICE OF MANAGEMENT AND BUDGET, CIR. A-11, PREPARATION, SUBMISSION, AND EXECUTION OF THE BUDGET § 20.4 (2002).

and particularly a military occupation, the absence of congressional authority for commanders, on their own initiative, to spend small amounts of that treasure quickly on urgent humanitarian projects can spell defeat in the struggle for hearts and minds. By providing a source of funding for the CERP in section 1110, Congress has furnished such authority.

### Challenges

As with other sophisticated tools, this one will help achieve the desired end only if employed with intelligence. Here the requirement is literal: if a commander spends CERP funds in a vacuum of military intelligence, it is quite possible to do more harm than good. The brief history of projects funded with seized former regime cash has demonstrated that all available information about local hostile elements and about the civilian population's sympathies, animosities, capabilities, economic condition, needs, wants, and traditions—both cultural and religious—should be brought to bear in the selection process.

Order generators and copper wiring from Ba'athists, and you may set off a spree of burglaries while also financing next month's attacks on your own troops. Ignore the tip from a townsman that Fedayeen mortars collapsed the roof of a neighborhood school, and you will lose the chance to help children return to their studies while gaining information about the location of improvised explosive devices (IEDs) and the organization of hostile cells<sup>117</sup> from their grateful parents. In terms of

how the brigade or division staff conducts operations, the key is to decide on CERP projects using the military decision-making process, built on thorough intelligence preparation of the battlefield.<sup>120</sup>

Integration of available intelligence into CERP-project planning is essential, but so too is synchronized execution of the project with the brigade's other systems.<sup>121</sup> Neighborhoods suffering collateral damage from direct and indirect fires should be high priorities for immediate and focused reconstruction. Opportunities to stretch the CERP funds or enhance their impact should be seized by using them in tandem with bulldozers, backhoes, and other engineer assets. Patrolling by ground maneuver forces should secure the areas where projects have been newly completed. Public affairs messages should be timed to make the most of these good news stories while avoiding any suggestion that loyalty or affection can simply be purchased—a notion revolting to cultural and religious sensibilities in this region of the world.<sup>122</sup>

Due effort should be made to ensure CERP projects complement rather than compete with projects and programs of other U.S. government organizations, of nongovernmental organizations, and of emerging local and national programs. In Iraq, priorities for reconstruction are established by the Coalition Provisional Authority in coordination with the Commanders of CJTF-7 and USCENTCOM, the DOD, and the National Security Council. In Afghanistan, the Chief of the U.S. diplomatic mission sets these priorities after consulting with the Com-

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117. Such as the rule strictly defining the circumstances in which adjustments may be made between appropriations, 31 U.S.C. § 1534, the rule requiring miscellaneous receipts to be deposited in the general treasury, *id.* §§ 3302(b) & 1552(b), the rules limiting non-reimbursable details between agencies, 4 FED. APPROP. LAW, *supra* note 116, at 15-52 to 15-57, and rules against augmenting one agency's appropriations with those of another, *see* 2 FED. APPROP. LAW, *supra* note 116, ch. 6. The property clause, *see* U.S. CONST. art. IV, § 3, cl. 2, and related laws and regulations, similarly prevent commanders from expending property on their own initiative (as opposed to funds) in an effort to win hearts and minds. This clause states that "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." *Id.*

118. *United States v. MacCollom*, 426 U.S. 317 (1976).

119. The identification of the structure and coordination of armed clandestine organizations that seek to impose their will upon a population is critical to destroying them without also destroying that population. *See* Trinquier, *supra* note 12, at 9, 11, 23; FM 3-07, *supra* note 7, at D-7 and fig. D-1.

120. *See* FM 101-5, *supra* note 26, ch. 5 (describing the military decision-making process); U.S. DEP'T OF ARMY, FIELD MANUAL 34-130, INTELLIGENCE PREPARATION OF THE BATTLEFIELD (8 July 1994).

121. Recall from the discussion, *supra* note 85, that a brigade commander has a distinct role in synchronizing operating systems. Synchronization of those systems at brigade level staffs occurs within a targeting team that employs a methodology that originated in the need to coordinate lethal fires but that has increasingly adapted to the demand for coordinating non-lethal effects throughout the brigade's area of operations. *See* U.S. DEP'T OF ARMY, FIELD MANUAL 6-20-10, TACTICS, TECHNIQUES, AND PROCEDURES FOR THE TARGETING PROCESS (8 May 1996); U.S. DEP'T OF ARMY, FIELD MANUAL 3-13, INFORMATION OPERATIONS DOCTRINE, TACTICS, TECHNIQUES, AND PROCEDURES app. E (Nov. 2003).

122. *See, e.g.,* BERNARD LEWIS, THE MIDDLE EAST 384 (1995).

Western technology and Western-style business introduced new ways of acquiring money; Western consumer culture offered a wide range of new ways of spending it. But for many, and not only those directly and adversely affected, the new ways were both an affront and a threat—an affront to their sense of decency and propriety, and a mortal threat to the most cherished of all their values, the religious basis of their society.

*Id.* Whether the spread of Western consumer goods should be judged as radically democratic or as cultural hegemony is beyond the scope of this paper. Some have observed that ordinary Iraqis appeared to have no religious, moral, or philosophical qualms about accepting goods from the United Arab Emirates that bore prominent labels explaining that the goods were donations from that wealthy country; nor did they seem offended by CERP-funded goods that soon bore similar labels explaining that they were from the United States. *See* E-mail from Colonel Richard Hatch, former Staff Judge Advocate of the 101st Airborne Division (Air Assault) to Author (7 Jan. 2004). The point here is simply that messages publicizing the good being done with CERP projects must be sensitive to religious and cultural values.

manders of the Combined Forces Command-Central Asia (CFC-CA), USCENTCOM, and members of his country team, and after receiving strategic guidance from the President and the Secretary of State.

A central, nationwide program to train, equip, and pay salaries of facility protection or other security personnel may be disrupted by disconnected programs initiated by commanders on a decentralized basis. Military-sponsored medical or dental care should emphasize the building of indigenous capability and should be coordinated with longer-term programs managed by humanitarian relief organizations and the U.S. Agency for International Development (USAID) to improve sustainability of necessary follow-on care and prevent the raising of unrealistic expectations.<sup>123</sup> Construction projects should balance responsiveness with quality by demonstrating rapid action to meet basic needs while also avoiding the situation where civilians are soon complaining over the roof that leaks, the sewage system that fails, or the U.S.-built pediatric ward that collapses. In general, the allure of quick, headline-grabbing victories should be tempered by the longer view habitual to agencies and organizations whose main mission and expertise is reconstruction and nation-building.<sup>124</sup> Also, commanders must be careful that local perceptions of them as powerful providers do not stunt the growth of legitimate local institutions and authorities.

Although the intent of section 1110 was to preserve the CERP as the responsive program it was in its early months, the use of appropriated funds inherently complicates things for commanders in ways that the use of seized funds did not. Appropriated CERP funds are not to be used to pay cash rewards to civilians for information they provide that is beneficial to tracking terrorists or locating arms caches because the DOD already has a rewards program authorized by statute.<sup>125</sup> Also, while the Foreign Claims Act does not apply, the funding of CERP with U.S. government appropriations creates policy implications inhibiting commanders from making CERP outlays that could be perceived as compensation for combat-related damage to civilians or their property, or even payments of solatia, nominal amounts offered as expressions of sympathy or condolence in some societies following a death.<sup>126</sup>

Additionally, the use of appropriated funds now more formally incorporates the SF 44 into CERP purchases, and while the normal purchase threshold of \$2,500 clearly does not bind project purchasing officers, the tendency of trained ordering officers will be to solicit oral price quotations from three sources for every purchase regardless of size and to otherwise be more careful in documenting measures to promote competition. In general, appropriated funding has anchored CERP to a new text—section 1110—and to a reporting requirement and tradition of accountability that will almost certainly change the program, regardless of stated congressional and Defense Department intent to preserve it intact.

The quarterly reporting requirement, in particular, will cause greater scrutiny of the security-oriented and larger infrastructural investments that were becoming a trend with seized funds in late 2003. In the November supplemental, Congress provided \$3.243 billion for “security and law enforcement” in Iraq, \$1.318 billion for “justice, public safety infrastructure,” \$5.56 billion for the “electric sector,” \$1.89 billion for “oil infrastructure,” and \$370 million for “roads, bridges, and construction,” and other huge reconstruction appropriations.<sup>127</sup> Given the concerns expressed by Congress during the legislative process about tapping O&M accounts for reconstruction projects when enormous sums were being appropriated specifically for those purposes, reports that large chunks of appropriated CERP funds are being used to recruit, train, equip, and pay security forces would likely raise eyebrows and could potentially threaten continuation of the program. The larger or more “indirectly” humanitarian the project, the more likely it will be subject to congressional skepticism.

In sum, the challenge the CERP presents to commanders is for projects to be coordinated and disciplined. Coordinating CERP projects with the efforts of all individuals, teams, and organizations that are pursuing the common objective—inside the brigade as well as outside—will yield maximum effects per dollar spent. Disciplining expenditures so that they focus on urgent, humanitarian needs of the civilian populace rather than infrastructure and security force investments will yield victo-

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123. Relief of “relative deprivation” is a tenet of counterinsurgency, *see* FM 3-07, *supra* note 7, at 3-4 and fig. D-1. Relative deprivation is an individual’s perception that he is worse off than other persons he compares himself to. *See* Walter Runciman, *RELATIVE DEPRIVATION AND SOCIAL JUSTICE: A STUDY OF ATTITUDES TO SOCIAL INEQUALITY IN TWENTIETH-CENTURY ENGLAND* 10 (1966). It is relative deprivation more than absolute deprivation that creates frustration in individuals and instability in a population. Sporadic episodes of assistance followed by neglect would seem more likely to increase than decrease relative deprivation, even if the individuals are, in an absolute sense, no worse off or even slightly better off than before.

124. *See* Cha, *supra* note 59 (“Soldiers are not development workers. There is industry skill, a body of knowledge that goes with it. You can’t just say ‘There’s a pothole over there and get it filled’ and fix a country.”) (quoting a spokesman for Christian Aid, a British humanitarian group).

125. *See supra* note 83.

126. Under the Foreign Claims Act, *see* 10 U.S.C. § 2734, injuries arising from combat activity are not payable; nor are claims for damages, losses, personal injuries, or deaths that are not caused by our armed forces. Solatia may be paid by the command from unit O&M funds if there is a prevailing custom for such payments. *See id.* § 2242; Memorandum, Director, Civil Law and Litigation, Air Force Legal Services Agency, to Air Component Command, U.S. Central Command, subject: Payments [to next of kin for friendly fire accident] (1 Feb. 2002); *see also* Captain Karin Tackaberry, *Judge Advocates Play a Major Role in Rebuilding Iraq: The Foreign Claims Act and Implementation of the Commander’s Emergency Response Program*, *ARMY LAW.*, Feb. 2004, at 39.

127. *See* 2004 ESAA, *supra* note 80, at 1225.

ries—both short and longer term—in the complex terrain of hearts and minds.

### Conclusion

If commanders surmount the challenges they face in implementing the CERP with appropriated funds, there is broad agreement among military leaders that the program's impact will be profound. The Chairman of the Joint Chiefs of Staff has described the CERP as the "most effective means we have of persuading ordinary Iraqis that we are there to help them and their families."<sup>128</sup> The Commander of CJTF-7 insists that "rapid and disciplined use of funds for local Iraqi projects is not only the right thing to do—it is absolutely key to accomplishing our mission."<sup>129</sup> The 101st Division Commander likely speaks for his fellow division commanders in saying that "we must win over as many people as possible and identify as many as possible who want us to fail," and that "money is our ammunition."<sup>130</sup>

Effectiveness of the program in the near term will require those with oversight responsibility, both within the DOD and in Congress, to resist the tendency to encumber the CERP with purpose-based fiscal prohibitions. An example of such a prohibition would be any policy statement or expression of congressional intent that to pay a reward, or purchase a policeman's uniform, or build a dam is an improper purpose for appropriated CERP funds as a matter of fiscal law. While controls on expenditure of public funds are essential and appropriate, the CERP's positive impact will continue to stem from commanders' ability to make judgment calls quickly about how best to benefit local Iraqis, and now also Afghans. Commanders will make these judgment calls based partly on information that only the mili-

tary among U.S. organizations will receive, due to frequent patrolling by soldiers in affected communities.

Adoption of a policy akin to the deference accorded commanders' decisions on how to dispose of alleged offenses under the Uniform Code of Military Justice would create the freedom of action necessary for the CERP to retain its signature responsiveness.<sup>131</sup> The present legal rule in section 1110 that O&M funds may be used "notwithstanding any other provision of law" is sound in that a commander responding to local urgent needs should not be inhibited by the possibility that his purposes may overlap with those of some other appropriation. Some overlap in purpose is inevitable and desirable. What valuably distinguishes the CERP is not that it is spent for unique purposes, but rather that it is spent by commanders locally, based on local information.<sup>132</sup> The only purpose-based legal prohibition relating to the CERP should be the extant, longstanding rule that conversion of public funds for personal enrichment is a crime.<sup>133</sup>

Over the longer term, the CERP should be made part of organic-authorizing legislation and codified in title 10. Division commanders who know that legal authority for the CERP is present and that Congress may choose to fund the program during a deployment can readily train brigade commanders in such a program. Combat Training Center rotations and institutional pre-command courses could similarly incorporate training on a stable program, and lessons learned could be collected, catalogued, and incorporated into leader development programs. Training and leader development provide the best sort of control, maximizing coordinated and disciplined use of the CERP without imposing the heavy hand of the Anti-Deficiency Act. While no system of control can eliminate every ill-chosen project, division and brigade commanders will demonstrate—

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128. Memorandum, General Richard B. Myers, Chairman of the Joint Chiefs of Staff to Captain Hal Dronberger, Legal Counsel, subject: CERP (10 Jan. 2004); *see also* General Richard B. Myers, Chairman of the Joint Chiefs of Staff, Posture Statement Before the 108th Congress Senate Armed Services Committee 11 (3 Feb. 2004) ("This program is an invaluable tool for establishing relationships with the Iraqi and Afghan people and assisting in developing and creating a safer environment.").

129. Lieutenant General Ricardo Sanchez, Commander, Combined-Joint Task Force-7, Comments to Commanders, in Baghdad, Iraq (14 June 2003) (author's meeting notes); *see also* E-mail from Lieutenant General Ricardo Sanchez to Author (20 Jan. 2004) ("To this day it remains the most effective combat multiplier for the ground commander in this extremely complex low intensity conflict environment.").

130. *See* Steele, *supra* note 67, at 10-11 (quoting Major General David H. Petraeus).

131. That deference is reflected in Rule for Court-Martial 306, which gives each commander discretion to dispose of offenses allegedly committed by members of that command and establishes the policy that allegations should be disposed at the lowest appropriate level so as to promote the interests of discipline, fairness, and the timely and efficient administration of justice. A superior may withhold the authority of a subordinate commander, but if authority has not been withheld, discretion may not be limited. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 306 (2002); *United States v. Coder*, 39 M.J. 1006, 1009-10 (1994).

132. The decentralized nature of successful counterinsurgency measures is a common theme, for instance, in historians' favorable assessments of the Combined Action Platoons deployed by the U.S. Marine Corps in Vietnam in 1965 and 1966. *See, e.g.,* GUENTER LEWY, *AMERICAN IN VIETNAM* 116-17 (1978). One U.S. Army brigade commander in Baghdad noted that "the CERP decentralized distribution ensured that money was going out through a 'sprinkler system' across the whole 'yard' vs out of a fire hydrant onto just one spot." *See* Interview with COL J.D. Johnson, *supra* note 54.

133. *See* 10 U.S.C. § 921 (2000). I am not advocating the relaxation of time-based, or amount-based fiscal controls. *See* discussion *supra* at notes 114-116 and accompanying text. Nor am I advocating the establishment of emergency and extraordinary expense authority akin to that in 10 U.S.C. § 127 for commanders. A commander's discretion in the use of CERP is circumscribed by deployment, by the requirement for urgent humanitarian response, and by the imperative, acknowledged by Congress in providing this unusual authority to use O&M for the CERP, that U.S. forces in the field be provided a tool for stabilization.

as they have done time and again—the optimal system is one that encourages their initiative and relies on their judgment.<sup>134</sup>

The unorthodox operations we undertake today have challenged our government to provide new mechanisms within the

law no less than they have challenged our armed forces to employ new technologies, weapons, organization, and tactics. The CERP promises to be one part of an answer to the legal challenge. As such, it is no small change of soldiering.

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134. Though specific tours of duty vary widely, a brigade commander typically has served about twenty-five years as an officer, has commanded at the company and battalion levels, has served as an operations officer or in other key staff positions at the brigade, division, and corps levels, has deployed twice on contingency or other joint and combined operations where he has teamed with other services, with diplomats and other U.S. government representatives overseas, and with foreign forces, has led units to multiple Combat Training Center (CTC) rotations, has served as an instructor and trainer at Army schools and at the CTCs, has received one or more graduate degrees from civilian universities, and has attended the Army War College or Senior Service College equivalent. Yet even with a wealth of training and prior experiences, brigade commanders seeking to make optimal use of CERP funds require assistance from judge advocates and other staff officers in order to maintain fairness and transparency in all purchasing actions and to ensure the coordinated and disciplined employment of this resource. The preparation of these officers must likewise become a focus of institutional and unit training and leader development.